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No. 02-

IN THE

# Supreme Court of the United States

BOARD OF EDUCATION OF THE
TOWNSHIP OF BRANCHBURG,

*Petitioner,*

*v.*

BOARD OF EDUCATION OF THE BOROUGH OF
SOMERVILLE; VITO A. GAGLIARDI;
DAVID LIVINGSTON,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

LANCE J. KALIK
RONALD Z. AHRENS
RIKER, DANZIG, SCHERER
HYLAND & PERRETTI, LLP
Headquarters Plaza
One Speedwell Avenue
P.O. Box 1981
Morristown, N.J. 07962
(973) 538-0800

KENNETH W. STARR
*Counsel of Record*
KANNON K. SHANMUGAM
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

*Counsel for Petitioner*

179271

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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## QUESTION PRESENTED

Whether parents required by state law to send their children to schools in a neighboring school district are entitled to proportional representation on the neighboring school district's board of education under the "one person, one vote" principle of the Fourteenth Amendment.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | i |
| Table of Contents | ii |
| Table of Cited Authorities | iii |
| Table of Appendices | viii |
| Introduction | 1 |
| Opinions Below | 2 |
| Statement of Jurisdiction | 2 |
| Pertinent Constitutional and Statutory Provisions | 2 |
| Statement of the Case | 3 |
| Reason for Granting the Petition | 7 |
| The Court Of Appeals Erred By Holding That Residents Were Not Entitled To Proportional Representation On A School Board To Which They Are Required To Send Their Children. | 7 |
| A. The Decision Below Is In Tension With This Court's Decision In *Holt*. | 8 |
| B. The Question Presented Is A Recurring Question Of Exceptional Importance. | 13 |
| Conclusion | 18 |

## TABLE OF CITED AUTHORITIES

*Page*

**Cases**

*Ambach v. Norwick*,
441 U.S. 68 (1979) ..... 10

*Avery v. Midland County*,
390 U.S. 474 (1968) ..... 1

*Baker v. Carr*,
369 U.S. 186 (1962) ..... 1

*Ball v. James*,
451 U.S. 355 (1981) ..... 11, 12

*Board of Education, Island Trees Union Free School District No. 26 v. Pico*,
457 U.S. 853 (1982) ..... 15, 16

*Board of Education of Branchburg Township v. Board of Education of Somerville*,
414 A.2d 259 (N.J. Super. App. Div. 1980) .... 4

*Board of Estimate of City of New York v. Morris*,
489 U.S. 688 (1989) ..... 13, 16

*Brown v. Board of Education*,
347 U.S. 483 (1954) ..... 10

*Burson v. Freeman*,
504 U.S. 191 (1992) ..... 16

*Cited Authorities*

*Page*

*Bush v. Gore*,
531 U.S. 98 (2000) ..... 16

*Chen v. City of Houston*,
532 U.S. 1046 (2001) ..... 17

*Duncan v. Coffee Cty.*,
69 F.3d 88 (6th Cir. 1995) ..... 10

*English v. Board of Education of Boonton*,
301 F.3d 69 (3d Cir. 2002), *cert. denied*,
123 S. Ct. 852 (2003) ..... 14, 15

*Evans v. Cornman*,
398 U.S. 419 (1970) ..... 9, 12

*Franklin Twp. v. Board of Education North Hunterdon Regional High School*,
74 N.J. 345 (1977) ..... 11

*Hadley v. Junior College District of Metropolitan Kansas City*,
397 U.S. 50 (1970) ..... 1, 11

*Holt Civic Club v. City of Tuscaloosa*,
439 U.S. 60 (1978) ..... *passim*

*Kramer v. Union Free Sch. Dist. No. 15*,
395 U.S. 621 (1969) ..... 1, 11

*Little Thunder v. South Dakota*,
518 F.2d 1253 (8th Cir. 1975) ..... 9

*Cited Authorities*


| | Page |
|---|---|
| *Mahan v. Howell*, 410 U.S. 315 (1973) | 13 |
| *Meyer v. Nebraska*, 262 U.S. 390 (1923) | 15 |
| *Mixon v. Ohio*, 193 F.3d 389 (6th Cir. 1999) | 10, 17 |
| *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) | 15 |
| *Pittman v. Chicago Board of Education*, 64 F.3d 1098 (7th Cir. 1995) | 12 |
| *Plyler v. Doe*, 457 U.S. 202 (1982) | 10 |
| *Reynolds v. Sims*, 377 U.S. 533 (1964) | 1 |
| *Township of Marlboro v. Board of Education of the Freehold Regional High School*, 992 F. Supp. 756 (D.N.J. 1998) | 11 |
| *Troxel v. Granville*, 530 U.S. 57 (2000) | 15 |
| *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972) | 15 |
| *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002) | 10 |

*Cited Authorities*

*Page*

**Constitutional Provisions, Statutes, and Rules**

U.S. Const. amend. I ..... 16

U.S. Const. amend. XIV ..... i, 2, 6

28 U.S.C. § 1254(1) ..... 2

N.J. Stat. Ann. § 18:14-6 (1940) ..... 5

N.J. Stat. Ann. § 18A:13-2 (1999) ..... 3

N.J. Stat. Ann. § 18A:38-2 (1999) ..... 3

N.J. Stat. Ann. § 18A:38-8 (1999) ..... 3

N.J. Stat. Ann. § 18A:38-8.1 (1999) ..... 6

N.J. Stat. Ann. § 18A:38-8.2 (1999) ..... 2, 6

N.J. Stat. Ann. § 18A:38-13 (1999) ..... 4

N.J. Stat. Ann. § 18A:38-19 (1999) ..... 3

N.J. Stat. Ann. § 18A:38-21.1 (1999) ..... 4

Sup. Ct. R. 10 ..... 7

*Cited Authorities*

*Page*

**Miscellaneous**

Richard Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 Colum. L. Rev. 1 (1990) ..... 17

Matthew Brown, *Sending Schools May Get Bigger Voice In Education*, The Record (Hackensack, N.J.), Apr. 6, 2001 ..... 13

Michael Deak, *Somerville Won't Attend Regionalization Meeting*, Somerset Messenger-Gazette, Feb. 3, 2000 ..... 5

Department of Education — Frequently Asked Questions, *at* http://www.state.nj.us/njded/genfo/faq.htm (last visited Mar. 2, 2003) ..... 13-14

Mathew J. Dowling, *School Board Pursues Battle*, Newark Star-Ledger, Dec. 12, 2002 ..... 14

Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 Harv. L. Rev. 1841 (1994) ..... 17

Glenn P. Smith, Note, *Interest Exceptions to One-Resident, One Vote: Better Results from the Voting Rights Act?*, 74 Tex. L. Rev. 1153 (1996) ..... 17

*Somerville, Branchburg Need Accord*, Courier News (Bridgewater, N.J.), Jan. 26, 2001 ..... 5

## TABLE OF APPENDICES

*Page*

Appendix A — Opinion Of The United States Court Of Appeals For The Third Circuit Dated And Filed December 4, 2002 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court For The District Of New Jersey, Dated And Filed July 2, 2001 ..... 26a

Appendix C — Opinion And Order Of The United States District Court For The District Of New Jersey, Dated May 21, 2001 And Filed May 22, 2001 ..... 30a

Appendix D — Opinion And Order Of The United States District Court For The District Of New Jersey Dated September 5, 2000 And Filed September 7, 2000 ..... 45a

## INTRODUCTION

Since first setting forth the "one person, one vote" principle in *Baker v. Carr*, 369 U.S. 186 (1962), this Court has applied that doctrine in a number of different contexts, ranging from the election of state legislators, *see Reynolds v. Sims*, 377 U.S. 533 (1964), to that of county officials, *see Avery v. Midland County*, 390 U.S. 474 (1968), to that of members of a local school board, *see Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969), to that of trustees of a community college, *see Hadley v. Junior Coll. Dist. of Metro. Kansas City*, 397 U.S. 50 (1970). This case presents a vital question under that doctrine: whether, when residents of a school district are required by state law to send their children to schools in a neighboring district, and are effectively required to pay a portion of their property taxes to that neighboring district, they are entitled to proportional representation on the school board of that district.

In this case, the Third Circuit held that they are not. The Third Circuit's decision turns on the interpretation of *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978), this Court's most recent pronouncement on the circumstances under which the extraterritorial exercise of authority by a governmental body violates the "one person, one vote" principle. This question is of extreme importance to the residents of the State of New Jersey, where school districts routinely send their students to schools in neighboring districts, and where students from the "sending" school district sometimes even outnumber those from the "receiving" district. This Court should grant *certiorari* to resolve the ambiguity in *Holt* and to ensure the consistent application of the principle of proportional representation.

## OPINIONS BELOW

The Third Circuit's opinion is reported at 312 F.3d 614 and reprinted in the Appendix ("App.") at 1a-25a. The district court's unpublished opinion is reprinted at App. 45a-53a.

## STATEMENT OF JURISDICTION

The Third Circuit entered judgment on December 4, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution states in pertinent part as follows:

> No State shall * * * deny to any person within its jurisdiction the equal protection of the laws.

N.J. Stat. Ann. § 18A:38-8.2 states in pertinent part as follows:

> A school district which is sending pupils to another school district pursuant to N.J.S.A. 18A:38-8 shall have representation on the board of education of the receiving school district as follows:
>
> > (a)(1) If the pupils of the sending district comprise less than 10 percent of the total enrollment of the pupils in the grades of the receiving district in

which the pupils of the sending district will be enrolled, the sending district shall have no representation on the receiving district board of education.

(2) If the pupils of the sending district comprise at least 10 percent of the total enrollment of the pupils in the grades of the receiving district in which the pupils of the sending district will be enrolled, the sending district shall have one representative on the receiving district board of education.

## STATEMENT OF THE CASE

1. Under New Jersey law, a public school district may fulfill its obligation to educate its students in one of three ways. *First*, the school district may build and maintain its own schools. *Second*, the school district may join with another district to form a "regional" school district. *See* N.J. Stat. Ann. § 18A:13-2 (1999). *Third*, the school district may enter into a "send-receive" relationship with another school district, whereby it "sends" its pupils to the "receiving" district's schools. *See* N.J. Stat. Ann. § 18A:38-8 (1999). The sending district is required to make a tuition payment to the receiving district for each pupil it sends. *See* N.J. Stat. Ann. § 18A:38-19 (1999).

Branchburg and Somerville are non-contiguous communities in Somerset County, New Jersey. *See* App. 11a. In 1956, petitioner Board of Education of the Township of Branchburg entered into a send-receive relationship with respondent Board of Education of the Borough of Somerville, for the purpose of sending its students to

Somerville High School. *See id.* When Branchburg entered into the relationship, it was a much smaller town than Somerville; as Branchburg grew in population, however, it sought to have a more meaningful voice in the education of its children. *See id.* at 11a-12a. Since 1970, Branchburg residents have fought unsuccessfully either to terminate or to alter the send-receive relationship with Somerville. *See id.* at 13a-15a.

New Jersey law provides that a send-receive relationship may be modified only if: (1) the sending district obtains the permission of the New Jersey Commissioner of Education to terminate the relationship; (2) the two districts agree to form a regional school district; or (3) the two districts agree to form a limited-purpose regional school district. *See* N.J. Stat. Ann. §§ 18A:38-13, 18A:38-21.1 (1999). Branchburg has repeatedly pursued all three statutory options, without success. *First*, in 1975, Branchburg petitioned the Commissioner of Education to withdraw from the send-receive relationship with Somerville. *See* App. 14a. The Commissioner denied the petition, however, and his denial was affirmed both by the State Board of Education and by the Appellate Division of the New Jersey Superior Court. *See Bd. of Educ. of Branchburg Twp. v. Bd. of Educ. of Somerville*, 414 A.2d 259, 263 (N.J. Super. App. Div. 1980) (noting that severance would create a racially non-diverse school in Branchburg and increase costs for both districts). *Second*, in 1996, Branchburg and Somerville conducted a feasibility study for a combined regional school district. *See* App. 15a. The experts retained for the study concluded, however, that the disadvantages of a regional school district outweighed the advantages. *See id.* at 14a. *Third*, in 1999, Branchburg conducted a feasibility study for a "limited purpose" regional school district. *See id.* Again, however,

the experts recommended against a regional school district. *See id.* Importantly, the Somerville Board has consistently opposed the formation of a regional school district with Branchburg. *See* C.A. App. 72a; *Somerville, Branchburg Need Accord*, Courier News (Bridgewater, N.J.), (Jan. 26, 2001, at A-13 (noting that "Somerville school officials have tried hard — very hard — to keep Branchburg under Somerville's thumb"); Michael Deak, *Somerville Won't Attend Regionalization Meeting*, Somerset Messenger-Gazette, Feb. 3, 2000, at A-1.

Since the formation of the send-receive relationship, Branchburg has grown dramatically. *See* App. 12a. As of the 2000 census, Branchburg is actually larger than Somerville, with 14,566 residents to Somerville's 12,423. *See id.* Branchburg students now constitute about 53% of the enrollment at Somerville High School; in the 1999-2000 school year, there were 428 Branchburg students attending Somerville High School, and only 377 Somerville students. *See id.* In the 2000-01 school year, Branchburg residents were projected to pay more than $4.8 million in property taxes to the Somerville Board to cover the education costs for Branchburg students at Somerville High School. *See id.*

Despite the fact that Branchburg students constitute a majority of the students at Somerville High School and Branchburg residents provide a substantial amount of the funding for the school, Branchburg residents have only limited representation on the Somerville Board. *See id.* From 1956 to 1995, Branchburg residents had no representation at all on the Somerville Board. *See, e.g.*, N.J. Stat. Ann. § 18:14-6 (1940). In 1996, the New Jersey Legislature amended the send-receive statute, recognizing for the first time that residents of a sending district should have at least some representation on the school

board of the receiving district. As amended, the statute allows a sending district to have a single representative on the board of the receiving district if pupils from the sending district constitute at least 10% of the students in the relevant grades of the receiving district. *See* N.J. Stat. Ann. § 18A:38-8.2(a) (1999). That representative is eligible to vote only on certain issues affecting the schools attended by students from the sending district, including capital spending and teacher dismissals. *See* N.J. Stat. Ann. § 18A:38-8.1 (1999). In Branchburg's case, the net result is that Branchburg has only one representative on the 10-member Somerville Board on some issues, and no representative at all on others. *See* App. 48a-49a.

2. Petitioner Branchburg Board and four Branchburg residents brought suit in federal court, claiming that the provision of the New Jersey send-receive statute allowing them only limited representation violated the "one person, one vote" principle of the Fourteenth Amendment. *See id.* at 15a. The district court granted plaintiffs' motion for summary judgment. *See id.* at 45a–53a. It found that, while Branchburg's citizens do not live within the Somerville school district, the "one person, one vote" principle never-theless applies because the Somerville Board has much more than an "limited" or "indirect extraterritorial effect" on Branchburg's citizens. *Id.* at 50a-51a. Specifically, the district court noted that the decisions of the Somerville Board "*directly* impact the future of Branchburg's children and the money flowing from Branchburg to Somerville," *id.* at 51a; that "Branchburg's citizens have a substantial interest in the high school education of their children," *id.* at 50a; and that "Branchburg and Somerville citizens both have an identical interest in the education provided" at the high school, *id.* at 51a. Because the New Jersey statute failed to provide proportional representation, the district court

concluded, it was unconstitutional as applied to Branchburg. *See id.* at 52a.

The Third Circuit reversed. *See id.* at 1a-25a. Relying on an earlier Third Circuit decision, the court of appeals held that strict scrutiny would apply to the exclusion of non-residents from the election of a particular governmental entity only when that entity "exercises a level of control over the non-residents' lives close to or equal to that which it exercises over those who actually reside within its borders." *Id.* at 20a (internal quotation omitted). The court found that, because the Somerville Board exercises authority over Branchburg residents only with regard to high school, rather than all grades, the powers exercised by the Somerville Board were not "co-extensive" with respect to Somerville and Branchburg residents, and strict scrutiny was therefore not warranted. *See id.* at 21a. The court applied the reasoning of its earlier decision even though that case involved a sending school district, unlike Branchburg, which had not attempted to terminate its send-receive relationship. *See id.* at 22a. The court proceeded to uphold the statute under rational basis review. *See id.* at 23a.

## REASON FOR GRANTING THE PETITION

### THE COURT OF APPEALS ERRED BY HOLDING THAT RESIDENTS WERE NOT ENTITLED TO PROPORTIONAL REPRESENTATION ON A SCHOOL BOARD TO WHICH THEY ARE REQUIRED TO SEND THEIR CHILDREN.

This Court should grant *certiorari* because the decision below is in tension with this Court's prior decision in *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978), and because the petition presents a recurring question of exceptional importance, *see* S. Ct. R. 10.

### A. The Decision Below Is In Tension With This Court's Decision In *Holt*.

The pathsetting decision in this area is *Holt*, in which this Court considered the circumstances under which the extraterritorial exercise of authority by a governmental body violates the "one person, one vote" principle. The Third Circuit's decision is at a minimum inconsistent with this Court's decision in *Holt*, and *certiorari* is therefore warranted.

1. In *Holt*, residents of an unincorporated Alabama community brought suit against the City of Tuscaloosa, challenging their exclusion from Tuscaloosa city elections. 439 U.S. at 62-63. Although the residents lived outside the city boundaries, they were nevertheless subject to a number of the city's regulations, most notably its police and sanitary regulations. *See id.* at 61-62.

The Court rejected the plaintiffs' challenge. Writing for the Court, then-Justice Rehnquist reasoned that the plaintiffs' claim, while "not without some logical appeal," *id.* at 70, ultimately failed because the city was exercising only "limited municipal powers" over residents within their police jurisdiction, *id.* The Court reasoned that the Alabama statute giving extraterritorial force to certain municipal powers bore a rational relationship to a legitimate state purpose, and was therefore constitutional. *See id.* at 70-75.

In upholding the Alabama statute, the Court noted that "several States grant their cities more extensive or intrusive powers over bordering areas than those granted under the Alabama statutes," *id.* at 72, and added that it "[did] not mean to imply that every one of [those statutes] would pass constitutional muster," *id.* at 72 n.8. Similarly, in his concurring

opinion, Justice Stevens emphasized that "this holding does not make all exercises of extraterritorial authority by a municipality immune from attack under the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 76.

Specifically, the Court expressly distinguished two factual patterns from the one at issue in *Holt*. *First*, the Court noted that *Holt* did not involve "a situation in which a city has annexed outlying territory in all but name, and is exercising precisely the same governmental powers over residents of surrounding unincorporated territory as it does over those residing within its corporate limits." *Id.* at 72 n.8 (citing *Little Thunder v. South Dakota*, 518 F.2d 1253 (8th Cir. 1975)). *Second*, the Court noted that *Holt* did not present a situation in which non-residents were subject to such "important aspects of state powers as [the] authority to levy and collect * * * income, gasoline, sales, and use taxes," and "were just as interested in and connected with electoral decisions as * * * their neighbors." *Id.* (quoting *Evans v. Cornman*, 398 U.S. 419, 423 (1970)) (internal quotation marks omitted). As to the latter, the Court cited the "vital and traditional authorities of cities and towns to levy ad valorem taxes, invoke the power of eminent domain, and zone property for various types of uses." *Id.*

2. *Holt* therefore suggests that, where a governmental body exercises the same degree of power over residents or non-residents, *or* where a governmental body subjects non-residents to "important aspects of state powers," a state statute providing non-residents with insufficient representation is subject to strict scrutiny. The Third Circuit, however, employed a much different test, holding that strict scrutiny applies only when a governmental body "exercises a level of control over the non-residents' lives close to or equal to that

which it exercises over those who actually reside within its borders." App. 20a (internal quotation omitted).[1] Because the Somerville Board "only exercises authority over Branchburg residents * * * with regard to the Somerville High School," and because "Branchburg is free to control the education of its children from K-8," the court reasoned that the powers of the Somerville Board were not "co-extensive" with regard to both Somerville and Branchburg residents, and thus applied rational basis scrutiny. *Id.* at 20a-21a. In so holding, the Third Circuit effectively ignored the second situation under which *Holt* seemed to recognize that strict scrutiny sould apply: namely, a situation in which a governmental body subjects non-residents to "important aspects of state powers."

a. At the outset, it cannot be questioned that the authority of localities over education is an "important aspect of state power." This Court has frequently stressed the significance of state power over education. In *Brown v. Board of Education* itself, the Court recognized that public education "is perhaps the most important function of state and local governments." 347 U.S. 483, 493 (1954); *see also Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2480 (2002) (Thomas, J., concurring) (same). Elsewhere, the Court has noted that education "fulfills a most fundamental obligation of government to its constituency," *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (internal quotation omitted), and that it is a "most vital civic institution for the preservation of a democratic system of government," *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (internal quotation omitted).

1. The Sixth Circuit has gone even further than the Third Circuit and, relying on *Holt*, has stated without qualification that rational basis review applies to *any* extraterritorial exercise of authority by a governmental body. *See Mixon v. Ohio*, 193 F.3d 389, 405 (6th Cir. 1999); *Duncan v. Coffee Cty.*, 69 F.3d 88, 94 (6th Cir. 1995).

Accordingly, the Court's treatment of education in the "one person, one vote" context "reflect[s] the Court's judgment as to the unique importance of education among the functions of modern local government." *Ball v. James*, 451 U.S. 355, 372 n.1 (1981) (Powell, J., concurring). In at least two cases, this Court has held that the "one person, one vote" principle is fully applicable to education-board elections, *see Hadley v. Junior Coll. Dist. of Metro. Kansas City*, 397 U.S. 50 (1970); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1960), and that such elections must therefore be held on a "strictly majoritarian basis," *Ball*, 451 U.S. at 372 n.1 (Powell, J., concurring). In so holding, the Court has relied heavily on the fact that "[e]ducation has traditionally been a vital governmental function." *Hadley*, 397 U.S. at 56. Indeed, lower courts have applied the "one person, one vote" principle to the "limited purpose regional" school districts authorized under New Jersey law, which, like many send-receive relationships, govern only high school education. *See Township of Marlboro v. Board of Educ. of the Freehold Reg. High Sch.*, 992 F. Supp. 756 (D.N.J. 1998); *Franklin Twp. v. Board of Educ. N. Hunterdon Reg. High Sch.*, 74 N.J. 345 (1977).

Unsurprisingly, therefore, this Court has indicated that education is one of the "vital and traditional" governmental powers that triggers strict scrutiny for purposes of the "one person, one vote" doctrine. In *Ball v. James*, the Court declined to apply strict scrutiny to a restriction on voting in an election for directors of an agricultural improvement and power district, reasoning that "the District simply does not exercise the sort of governmental powers that invoke the strict demands" of the "one person, one vote" principle. 451 U.S. at 366. In creating an exception for such "special-purpose district" elections, the Court noted that the district at issue

"cannot enact any laws governing the conduct of citizens, nor does it administer such normal functions of government as * * * *the operation of schools*." *Id.* (emphasis added). In *Evans*, the Court held that residents of a federal enclave were entitled to vote in state elections, *inter alia*, because they sent their children to the State's public schools. *See* 398 U.S. at 424. And in *Holt* itself, Justice Stevens, in his concurring opinion, expressly included the "operation of schools" in his list of important powers not exercised by Tuscaloosa. 439 U.S. at 76.

b. Nor can it be questioned that the authority of localities over taxation is also an "important aspect of state power." As we have already seen, in *Holt* itself, this Court distinguished between the exercise of limited municipal powers by the City of Tuscaloosa and the exercise of the "vital and traditional authorit[y]" to "levy ad valorem taxes." *Id.* at 72 n.8. And in *Ball*, the Court noted that the agricultural improvement and power district lacked the power to "impose ad valorem property taxes," just as it lacked the power over the operation of schools. 451 U.S. at 366. Moreover, in the specific context of education, at least one lower court has emphasized the importance of the power to tax in determining whether a school-board election is subject to the "one person, one vote" doctrine. *See Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098, 1102-03 (7th Cir. 1995) (Posner, then-C.J.).

Here, although the Somerville Board does not formally have the power to tax Branchburg residents directly, it has the functional equivalent of that power in the form of the power to collect tuition payments from the Branchburg Board — payments that are, in turn, made out of property tax revenues collected by that board. *See* App. 12a. That power

is a substantial one: as we have noted, in the 2000-01 school year alone, the Somerville Board was projected to collect more than $4.8 million from the Branchburg Board. *See id.*

c. By failing to recognize that the "one person, one vote" doctrine is fully applicable where a governmental body subjects non-residents to "important aspects of state powers," the Third Circuit's decision in this case is in tension with this Court's prior decision in *Holt*. Had the Third Circuit applied strict scrutiny, it would surely have struck down the New Jersey scheme on the ground that it fails to provide adequate representation for Branchburg residents. *See Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 693-94, 702 (1989) (stating that 78% deviation from equal representation was unacceptable); *Mahan v. Howell*, 410 U.S. 315, 329 (1973) (stating that a 16.4% deviation approaches "tolerable limits"). *Certiorari* is warranted in order to put to rest any ambiguity in this Court's decision in *Holt*. This Court should grant *certiorari* and hold that strict scrutiny is applicable to the New Jersey scheme.

### B. The Question Presented Is A Recurring Question Of Exceptional Importance.

*Certiorari* is further warranted because the Third Circuit's decision in this case will have substantial practical and legal implications.

1. This case presents a question of great significance to the residents of New Jersey with respect to the constitutionality of New Jersey's unique "send-receive" scheme. At present, over 215 New Jersey school districts — more than a third of the districts in the State — are in send-receive relationships with other districts. *See* Matthew Brown, *Sending Schools May Get Bigger Voice In Education*, The Record (Hackensack, N.J.), Apr. 6, 2001, at A1; Department of Education —

Frequently Asked Questions, *at* http://www.state.nj.us/njded/genfo/faq.htm (last visited Mar. 2, 2003).

In many of those cases, the sending districts, like Branchburg, are unable to extricate themselves from their send-receive relationships. *See* App. 15a. As we have already noted, Branchburg residents have sought to terminate or alter their relationship with Somerville for more than three decades. *See id.* at 13a-15a. However, their efforts have been blocked at every turn, either by the State or by the Somerville Board. *See id.* In fact, the State of New Jersey has never approved the severance of a send-receive relationship where students from the sending district constitute more than 25% of the students in the receiving district's high schools — much less where, as here, they constitute a majority. *See* C.A. App. 85a.

Moreover, perhaps because receiving districts are typically larger than sending districts, efforts to amend the send-receive statute to provide sending districts more representation or to allow them more easily to quit their send-receive relationships have likewise failed. *See* Mathew J. Dowling, *School Board Pursues Battle*, Newark Star-Ledger, Dec. 12, 2002, at 23. Other sending districts have therefore sought to terminate their send-receive relationships in litigation, with at least one advancing constitutional claims similar to those at issue in this case. *See English v. Board of Educ. of Boonton*, 301 F.3d 69 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 852 (2003).[2] Absent this Court's intervention, such litigation is likely to continue.

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2. Crucially, in *English*, unlike this case, the sending district had made no attempt to extricate itself from its send-receive relationship. In its decision in this case, the Third Circuit expressly relied on that pivotal fact. *See* 301 F.3d at 80. Because Branchburg

(Cont'd)

2. New Jersey's send-receive scheme implicates important rights: namely, the right of Branchburg residents in their capacity as parents to educate their children as they see fit, and the right of Branchburg residents in their capacity as voters to participate fully in the governance of their own affairs.

By placing important educational decisions in the hands of a school board that does not adequately represent them, the New Jersey send-receive statute denies the parents of Branchburg and other localities a meaningful opportunity to guide and control their children's education. As Justice Powell once noted, "[a]part from health, no subject is closer to the hearts of parents than their children's education." *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 894 (1982) (dissenting opinion). Indeed, "[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society." *Wright v. Council of the City of Emporia*, 407 U.S. 451, 469 (1972). The Court has thought this right so valuable that it has recognized in parents a substantive due process right to direct and control their children's upbringing and education. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (plurality opinion); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Perhaps because of the preeminent interest parents have in the education of their children, the "governance of elementary and secondary education traditionally has been placed in the hands of a local board responsible locally to the parents and citizens of school districts." *Pico*, 457 U.S. at 894 (Powell,

(Cont'd)
cannot terminate or alter its relationship with Somerville, this case presents a superior vehicle for consideration of the "one person, one vote" question than *English*.

J., dissenting). It is "[t]hrough participation in the election of school board members [that] parents influence, if not control, the direction of their children's education." *Id.* at 891 (Burger, C.J., dissenting).

The New Jersey send-receive statute also denies the parents of Branchburg and other localities the right to participate fully in the governance of their own affairs. The "one person, one vote" doctrine, of course, is grounded in the principle that every citizen's vote should be of equal weight. This Court has frequently noted that voting is "one of the most fundamental and cherished liberties in our democratic system of government," *Burson v. Freeman*, 504 U.S. 191, 214 (1992) (Kennedy, J., concurring), and that "each and every citizen has an inalienable right to full and effective participation in the political processes of the legislative bodies of the Nation, State, or locality" in which he lives, *Morris*, 489 U.S. at 693 (internal quotation omitted). As this Court famously noted in *Bush v. Gore*, 531 U.S. 98 (2000), an "arbitrary and disparate treatment" that grants one group "greater voting strength than another" violates core principles of equal protection, *id.* at 107.

Like the rights protected by the First Amendment, the rights implicated by the New Jersey send-receive system are so fundamental that this Court has routinely acted to protect them even absent a circuit split — particularly where, as here, the regulatory scheme being challenged is a unique one. The Court should do likewise here.

3. This case has implications not only for the New Jersey send-receive scheme, but also for a wide variety of state laws providing for some form of extraterritorial jurisdiction. In *Holt*, this Court noted that some 35 States authorize their

municipal subdivisions to exercise extraterritorial power over adjoining areas. *See* 439 U.S. at 72. The Court's decision in this case will clarify the circumstances, if any, under which the extraterritorial exercise of authority by a governmental body violates the "one person, one vote" principle.

"As long as [the Court] sustain[s] the one-person, one-vote principle, [it] ha[s] an obligation to explain to States and localities what it actually means." *Chen v. City of Houston*, 532 U.S. 1046, 1048 (2001) (Thomas, J., dissenting from denial of certiorari). This Court's decision in *Holt* has spawned uncertainty not only in the lower courts,[3] but also among commentators.[4] This case presents an ideal vehicle to address the applicability of the "one person, one vote" principle to the exercise of extraterritorial power by one of the most important types of governmental entities in our Nation — the entities in charge of our children's education.

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3. *Compare* App. 20a (stating that "one person, one vote" principle applies in extraterritorial situations when a governmental body "exercises a level of control over the non-residents' lives close to or equal to that which it exercises over those who actually reside within its borders") (internal quotation omitted), *with Mixon v. Ohio*, 193 F.3d 389, 405 (6th Cir. 1999) (stating that "one person, one vote" principle never applies).

4. *Compare* Richard Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 Colum. L. Rev. 1, 91 n.380 (1990) (suggesting that "one person, one vote" principles applies when non-residents are subject to the "hallmarks" of local governmental power), *with* Glenn P. Smith, Note, *Interest Exceptions to One-Resident, One Vote: Better Results from the Voting Rights Act?*, 74 Tex. L. Rev. 1153, 1169-70 (1996) (stating that "one person, one vote" principle never applies), *and* Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 Harv. L. Rev. 1841, 1866 (1994) (same).

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

LANCE J. KALIK
RONALD Z. AHRENS
RIKER, DANZIG, SCHERER
HYLAND & PERRETTI, LLP
Headquarters Plaza
One Speedwell Avenue
P.O. Box 1981
Morristown, N.J. 07962
(973) 538-0800

KENNETH W. STARR
*Counsel of Record*
KANNON K. SHANMUGAM
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

*Counsel for Petitioner*

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED DECEMBER 4, 2002**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 01-3151

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BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG; GREGORY SCOTT; GERALDINE FELDMAN; PATRICIA BOWERS; ROBERT J. FULTON, JR., BETH KOVACS; CHRISTINE IHLING; STEVEN JANKOSKI

v.

DAVID LIVINGSTON, Somerset County Superintendent; WILLIAM L. LIBRERA*, State Commissioner of Education; THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey

(D.C. No. 98-cv-05557)

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BETH KOVACS; CHRISTINE IHLING; STEVEN JANKOSKI

v.

DAVID LIVINGSTON, Somerset County Superintendent; WILLIAM L. LIBRERA*, State Commissioner of Education;

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* Amended Pursuant to F.R.A.P 43(c)

*Appendix A*

THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey

(D.C. No. 99-cv-00822)

Board of Education of the Township of Branchburg; Gregory Scott; Geraldine Feldman; Patricia Bowers; Robert J. Fulton, Jr.,

*Appellants*

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Nos. 01-3152 and 01-3153

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BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG; GREGORY SCOTT; GERALDINE FELDMAN; PATRICIA BOWERS; ROBERT J. FULTON, JR., BETH KOVACS; CHRISTINE IHLING; STEVEN JANKOSKI

v.

DAVID LIVINGSTON, Somerset County Superintendent; WILLIAM L. LIBRERA*, State Commissioner of Education; THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey

(D.C. No. 98-cv-05557)

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* Amended Pursuant to F.R.A.P 43(c)

*Appendix A*

BETH KOVACS; CHRISTINE IHLING; STEVEN JANKOSKI

v.

DAVID LIVINGSTON, Somerset County Superintendent; WILLIAM L. LIBRERA*, State Commissioner of Education; THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey

(D.C. No. 99-cv-00822)

David Livingston; William L. Librera*,

*Appellants*

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No. 01-3217

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BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG; GREGORY SCOTT; GERALDINE FELDMAN; PATRICIA BOWERS; ROBERT J. FULTON, JR., BETH KOVACS; CHRISTINE IHLING; STEVEN JANKOSKI

v.

DAVID LIVINGSTON, Somerset County Superintendent; WILLIAM L. LIBRERA*, State Commissioner of Education;

---

* Amended Pursuant to F.R.A.P 43(c)

*Appendix A*

THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey

(D.C. No. 98-cv-05557)

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BETH KOVACS; CHRISTINE IHLING; STEVEN JANKOSKI

v.

DAVID LIVINGSTON, Somerset County Superintendent; WILLIAM L. LIBRERA*, State Commissioner of Education; THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey

(D.C. No. 99-cv-00822)

The Board of Education of the Borough of Somerville,

*Appellant*

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No. 01-3334

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BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG; GREGORY SCOTT; GERALDINE FELDMAN; PATRICIA BOWERS; ROBERT J. FULTON, JR.; BETH KOVACS; CHRISTINE IHLING; STEVEN JANKOSKI

v.

---

* Amended Pursuant to F.R.A.P 43(c)

*Appendix A*

DAVID LIVINGSTON, Somerset County Superintendent; WILLIAM L. LIBRERA*, State Commissioner of Education; THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey

(D.C. No. 98-cv-05557)

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BETH KOVACS; CHRISTINE IHLING; STEVEN JANKOSKI

v.

DAVID LIVINGSTON, Somerset County Superintendent; WILLIAM L. LIBRERA*, State Commissioner of Education; THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey

(D.C. No. 99-cv-00822)

Beth Kovacs; Christine Ihling; Steven Jankoski,

*Appellants*

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No. 01-3413

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BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG; GREGORY SCOTT; GERALDINE FELDMAN; PATRICIA BOWERS; ROBERT J. FULTON, JR., BETH KOVACS; CHRISTINE IHLING; STEVEN JANKOSKI

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* Amended Pursuant to F.R.A.P 43(c)

*Appendix A*

v.

DAVID LIVINGSTON, Somerset County Superintendent; WILLIAM L. LIBRERA*, State Commissioner of Education; THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey

(D.C. No. 98-cv-05557)

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BETH KOVACS; CHRISTINE IHLING; STEVEN JANKOSKI

v.

DAVID LIVINGSTON, Somerset County Superintendent; WILLIAM L. LIBRERA*, State Commissioner of Education; THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey

(D.C. No. 99-cv-00822)

The Board of Education of the Borough of Somerville,

*Appellant*

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* Amended Pursuant to F.R.A.P 43(c)

*Appendix A*

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Nos. 98-cv-05557 and 99-cv-00822)
District Judge: Hon. Anne E. Thompson

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Submitted Under Third Circuit LAR 34.1(a)
July 25, 2002

Before: SLOVITER, NYGAARD, and BARRY, *Circuit Judges*

(Filed: December 4, 2002)

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**OPINION OF THE COURT**

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SLOVITER, *Circuit Judge.*

In *English v. Board of Education of Boonton*, 301 F.3d 69, 81 (3d Cir. 2002), this court held that the New Jersey statute providing for no more than one representative of a sending school district to participate on the receiving district's board of education did not violate the one person, one vote constitutional requirement. The issue this case presents is whether *English* applies when the sending school district cannot withdraw from its send-receive relationship.

I.

The Township of Branchburg School District and the Borough of Somerville School District, nearby towns in New Jersey, entered into a "send-receive" relationship in 1956 for the education of Branchburg high school students, a relationship authorized and governed by New Jersey statute.

*See* N.J. Stat. Ann. § 18A:38-8 (West 1999). Under New Jersey law, each school district has an obligation to educate the students in its district from K through 12 at its own expense. *See id.* § 18A:38-1 (Attendance at school free of charge). The send-receive relationship enables Branchburg to fulfill its statutory obligation to educate its high school students by sending them to Somerville High School and paying the Somerville School District tuition that reflects the "actual cost" of educating the students. *See id.* § 18A:38-19. However, under New Jersey law, Branchburg residents are entitled to the representation of only one member on the ten-member Somerville Board of Education ("Somerville Board"), despite the fact that Branchburg students comprise more than half of the enrollment at Somerville High School. *See id.* § 18A:38-8.2.

The Board of Education of the Township of Branchburg and four Branchburg residents ("Branchburg Appellants") brought this action in the District Court for the District of New Jersey claiming that N.J. Stat. Ann. § 18A:38-8.2 violates the "one person, one vote" principle of the Equal Protection Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1. The District Court granted the Branchburg plaintiffs' motion for summary judgment and denied summary judgment requested by the defendants, the Somerville Board, the State Commissioner of Education, and the Somerset County Superintendent, holding that the send-receive statute was unconstitutional as applied to Branchburg. App. at Pa14 (*Bd. of Educ. of Branchburg v. Livingston*, No. 98-5557 (D.N.J. Sept. 5, 2000)). The District Court ordered an interim remedial plan that increased the size of the Somerville Board to 15 members and increased

Branchburg's representation on that Board to six members, out of the 15, with the right to vote on issues affecting Branchburg high school students. App. at Pa17-29 (*Bd. of Educ. of Branchburg v. Livingston*, No. 98-5557 (D.N.J. May 22, 2000)). The interim plan was to remain in effect until the New Jersey state legislature passed new legislation to address the matter. *Id.*

The Branchburg Appellants seek appellate review of the District Court's orders dated May 22, 2001 and July 2, 2001 limiting interim relief to the addition of six members to the Somerville Board. The Somerville Appellees cross appeal the District Court's orders dated September 5, 2000, May 22, 2001, and July 2, 2001 granting Branchburg summary judgment and instituting the interim remedial plan.[1]

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1. The parties have filed notices of appeal from various orders of the District Court. In No. 01-3151, the Branchburg plaintiffs appeal the District Court's order dated May 22, 2001, creating the interim plan for increasing Branchburg representation on the Somerville Board to six members and the July 2, 2001 order denying reconsideration of the interim plan.

In No. 01-3152, the Somerville defendants appeal the same two orders. In No. 01-3153, the Somerville defendants cross appeal from the District Court's order of September 5, 2000, granting summary judgment for the plaintiffs holding the New Jersey statute unconstitutional, and also include in their notice appeals from the May 22, 2001 and July 2, 2001 orders. In No. 01-3217, the Somerville Board of Education cross appeals from the same orders as in No. 01-3153.

In No. 01-3334, Beth Kovacs, Christine Ihling and Steven Jankoski (hereafter "Kovacs Plaintiffs") appeal the District Court's

(Cont'd)

*Appendix A*

## II.

## FACTS AND PROCEDURAL BACKGROUND

Much of the material that follows is set forth in *English* but is included here to provide background for our ultimate holding.

The New Jersey public school system is organized in geographical units called school districts. Under New Jersey law, a school district that chooses not to develop high school facilities must designate a high school outside the district to receive its high school students. N.J. Stat. Ann. § 18A:38-11. Correspondingly, a school district may receive students from outside its district. *Id.* § 18A:38-8. An agreement between two school districts whereby one district sends its high school students to attend a school in another district is commonly called a "send-receive" relationship.

Once two communities establish a send-receive relationship, the sending district becomes entitled to one representative on the receiving district's school board if its students comprise at least 10 percent of the total enrollment, in the applicable grades, of the receiving school.

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(Cont'd)

July 23, 2001 order denying their summary judgment motion for an interim remedy for voters' rights in Somerville school budget and bond elections.

In No. 01-3413, the Somerville Board cross appeals the District Court's orders dated September 5, 2000 and July 23, 2001.

*Id.* § 18A:38-8.2a (2).[2] If the students from the sending district comprise less than 10 percent of the receiving school's total enrollment, the sending district is not entitled to any representation on the receiving district's school board. *Id.* § 18A:38-8.2a(1). Conversely, even if the students from the sending district greatly exceed 10 percent of the receiving school's enrollment, the sending district is limited to a maximum of one representative on the receiving district's school board.

The Branchburg and Somerville school districts are non-contiguous communities in Somerset County, New Jersey. In 1956, they entered into a send-receive relationship.

2. A school district which is sending pupils to another school district pursuant to N.J.S. 18A:38-8 shall have representation on the board of education of the receiving school district as follows:

> a.(1) If the pupils of the sending district comprise *less than 10 percent* of the total enrollment of the pupils in the grades of the receiving district in which the pupils of the sending district will be enrolled, the sending district shall have *no* representation on the receiving district board of education.
>
> (2) If the pupils of the sending district comprise *at least 10 percent* of the total enrollment of the pupils in the grades of the receiving district in which the pupils of the sending district will be enrolled, the sending district shall have *one representative* on the receiving district board of education.

*Id.* § 18A:38-8.2 (emphasis added).

*Appendix A*

The agreement allowed Branchburg high school students to attend Somerville High School in return for tuition payments from the Branchburg district to cover the costs of the students' education. When the agreement was made it fit the needs of both communities because Branchburg lacked high school facilities and Somerville had excess capacity in its school facilities.

Since the formation of the send-receive relationship, Branchburg's population has grown substantially. Based on the 2000 federal census, Branchburg's population of 14,566 residents now exceeds Somerville's population of 12,423 residents. Consequently, the students from the Branchburg district attending Somerville High School comprise approximately 53 percent of the High School's enrollment. For the 1999-2000 school year, 428 Branchburg students attended Somerville High School compared to 377 Somerville students. At the time the District Court heard evidence, residents of the Branchburg district were projected to pay $4,872,846 dollars in property taxes to the Somerville Board to cover the education costs for Branchburg students during the 2000-2001 school year.

Despite the fact that Branchburg students comprise a majority of the enrollment at Somerville High School, under the New Jersey statute Branchburg may only appoint one representative to the ten-member Somerville Board. *See* N.J. Stat. Ann. § 18A:38-8.2a (2). The Branchburg representative is entitled to vote on certain issues involving the High School,

including capital spending and teacher dismissals.[3] The votes of each member of the Somerville Board are weighted equally.

Beginning in 1970, the Branchburg and Somerville districts initiated discussions to terminate the relationship. There are three methods for severing a send-receive relationship in New Jersey, and Branchburg has tried all three, unsuccessfully. First, in September 1975, the Branchburg Board filed a petition with the State Commissioner of Education to withdraw from its send-receive relationship

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3. N.J. Stat. Ann. § 18A:38-8.1 states that a sending district's representative is eligible to vote on the following:

> a. Tuition to be charged the sending district by the receiving district and the bill lists or contracts for the purchase, operation or maintenance of facilities, equipment and instructional materials to be used in the education of the pupils of the sending district;
>
> b. New capital construction to be utilized by sending district pupils;
>
> c. Appointment, transfer or removal of teaching staff members providing services to pupils of the sending district, including any teaching staff member who is a member of the receiving district's central administrative staff; and
>
> d. Addition or deletion of curricular and extra-curricular programs involving pupils of the sending district.

with Somerville. Under N.J. Stat. Ann. § 18A:38-13, the Commissioner may approve a petition for severance only if "no substantial negative impact will result therefrom." The Commissioner denied Branchburg's petition, finding that severance of the send-receive relationship would have, among other things, negative financial implications for the two districts involved. The Commissioner's decision was affirmed by both the New Jersey State Board of Education and the New Jersey Superior Court, Appellate Division. *Bd. of Educ. of Branchburg Twp. v. Bd. of Educ. of Somerville*, 414 A.2d 259, 263 (N.J. Super. App. Div. 1980). The court held that the agency's factual determinations, that severance would negatively impact the districts by creating a "virtually all-white school" in Branchburg and increasing the educational costs of both districts, were amply supported by the record. *Id.* at 262-63.

The remaining two options available for terminating a send-receive relationship require the creation of either an "all purpose" regional school district or a "limited purpose" regional school district under N.J. Stat. Ann. § 18A:13-2. The formation of a regional school district likely would improve Branchburg's representation by creating a new school board. *See Bd. of Educ. of Englewood Cliffs v. Bd. of Educ. of Englewood*, 608 A.2d 914, 948 (N.J. Super. App. Div. 1992) ("Regionalization, on the other hand, involves the formation of an entirely new school district governed by a separate board of education.").

In 1996, Branchburg and Somerville conducted a feasibility study for an "all purpose" regional school district. The experts retained for the study concluded that the disad-

vantages of a regional school outweighed the advantages. Similarly, in 1999, Branchburg, this time at the direction of an order by the District Court, conducted a feasibility study for a "limited purpose" 9-12 regional school district. App. at Pa67-69 (*Bd. of Educ. of Branchburg v. Livingston*, No. 98-5557 (D.N.J. April 9, 1999); *Bd. of Educ. of Branchburg v. Livingston*, No. 98-5557 (D.N.J. May 4, 1999)). Again, the experts recommended against the development of a regional school district. Thus, both parties agree that Branchburg cannot withdraw from the send-receive relationship in the foreseeable future.

The Branchburg Board of Education and four individual residents of Branchburg brought suit in the United States District Court for the District of New Jersey against the Somerville School Board, the State Commissioner of Education, and the Somerset County Superintendent. The Branchburg Appellants alleged that N.J. Stat. Ann. § 18A:38-8.2 was unconstitutional as applied to Branchburg because it violated the "one person, one vote" principle of the Fourteenth Amendment of the United States Constitution, by denying Branchburg proportional representation on the Somerville Board. Similarly, Beth Kovacs, Christine Ihling, and Steven Jankoski (hereafter "Kovacs Plaintiffs") brought suit in the same District Court alleging that the New Jersey statute in question violated their Fourteenth Amendment rights by denying Branchburg residents the right to vote along with Somerville residents in Somerville school budget and referenda elections.

*Appendix A*

The parties filed cross motions for summary judgment, and the District Court granted summary judgment to the Branchburg plaintiffs. App. at Pa10-16 (*Bd. of Educ. of Branchburg v. Livingston*, No. 98-5557 (D.N.J. Sept. 5, 2000)). The Court held that N.J. Stat. Ann. § 18A:38-8.2 was unconstitutional as applied "because it denies Branchburg citizens the right to elect representatives to oversee the high school education of their children in contravention of the 'one person, one vote' principle." *Id.* at Pa14. The District Court ordered an interim remedy that increased Branchburg's representation on the Somerville Board to six members, out of a total of 15 members, and granted the new members an equal vote on issues affecting Branchburg high school students. App. at Pa17-18 (*Bd. of Educ. of Branchburg v. Livingston*, No. 98-5557 (D.N.J. May 22, 2000)). The Branchburg Appellants have appealed the District Court's interim remedy, and the Somerville defendants have cross appealed both the District Court's holding that N.J. Stat. Ann. § 18A:38-8.2 is unconstitutional and the Court's interim remedy.

*Appendix A*

## III.

## DISCUSSION

### A. Jurisdiction and Standard of Review

We have appellate jurisdiction pursuant to 28 U.S.C. § 1291 to review a district court's final judgment.[4] Our review of a district court's grant of summary judgment is plenary, applying the same standard used by the district court. *English*, 301 F.3d at 75-76. A grant of summary judgment will be upheld if "there is no genuine issue of material fact and if, viewing the facts in the light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of law." *English*, 301 F.3d at 76 (citations omitted); *see* Fed. R. Civ. P. 56(c).

### B. The Effect of the *English* Decision

We used a two-step analysis in *English* to determine whether N.J. Stat. Ann. § 18A:38-8.2 violates the Equal Protection Clause. First, we considered whether we should review the statute under strict scrutiny or rational basis review. We concluded that rational basis review of the

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4. Our jurisdiction is limited to review of the District Court's grant of summary judgment to the Branchburg plaintiffs and the Court's interim remedy. The Notice of Appeal of the Kovacs Plaintiffs from the District Court's order of July 23, 2001 denying their motion for summary judgment for more extensive interim relief is not appealable and will be dismissed. However, their position (presented to the District Court) is considered in the text in conjunction with the appeals properly before us.

limitation of representation on the receiving district's board was appropriate because the receiving district was not exercising the same governmental powers over the sending district as it does over its own residents. *English*, 301 F.3d at 77-79. Second, we analyzed whether New Jersey had a rational basis for granting sending districts no more than one representative on the receiving district's school board. We concluded that the New Jersey legislature has legitimate reasons for limiting the representation of sending districts in the decisions of the receiving district's board. *Id.* at 82-83.

The facts in *English* are nearly identical to the facts in the present case. In both cases, the district sending its students to the receiving school made up more than 50 percent of the school's enrollment but, due to New Jersey law, the sending district is limited to one representative on the receiving district's school board. Branchburg does not allege that the Somerville Board exerts any powers beyond those at issue in *English*.

Due to the extensive similarities with *English*, Branchburg is limited to two grounds for distinguishing its case. First, Branchburg, the sending district, unlike the sending district in *English*, has already attempted several times to sever the send-receive agreement and its efforts have been rejected. Consequently, Branchburg argues that there is not a rational basis for limiting its representation on the Somerville Board because its relationship with Somerville High School is permanent and Branchburg residents share a long-term interest in the school equivalent to the interests of Somerville residents.

Second, the Kovacs Plaintiffs argue that the remedy they seek is unique and was not presented in *English*. They argue that they are not only seeking additional representation on the Somerville Board, but also the right to vote on the annual Somerville High School budget and any referenda affecting the High School.

**C. Effect of Branchburg's Inability to Sever the Send-Receive Relationship**

Branchburg argues that the rational basis standard of review applied in *English* is inapplicable here because it has been unable, and will continue to be unable for the foreseeable future, to sever its relationship with Somerville. It also argues that the conclusion reached in *English* that the New Jersey statute has a rational basis should not govern this case for the same reason. We reject both arguments.

In *English*, we acknowledged that the denial of an equal voice in elections generally is reviewed under strict scrutiny. 301 F.3d at 76. We noted, however, that the Supreme Court has identified exceptions to that standard of review, including "geography-based restrictions on the franchise . . . when a municipality exercises 'extraterritorial' powers over individuals outside its boundaries[.]" *Id.* at 72 (citing *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 69 (1978)). Such voting restrictions on non-residents, even if the actions by the elected body inevitably affect non-residents, only receive rational basis review. *Id.* at 72, 77 (citing *Holt*, 439 U.S. at 68-70).

*Appendix A*

The Supreme Court in *Holt* cautioned that there may be limits on the ability to restrict the franchise of non-residents if the city has "annexed outlying territory in all but name." 439 U.S. at 72 n.8 (citing *Little Thunder v. South Dakota*, 518 F.2d 1253 (8th Cir.1975)). We have interpreted *Holt*:

> as meaning that strict scrutiny will be applied to the exclusion of non-residents from the elections of a particular governmental entity only when that unit of government exercises a level of control over the non-residents' lives close to or equal to that which it exercises over those who actually reside within its borders.

*English*, 301 F.3d at 79.

In *English*, we concluded that the Boonton School Board, the receiving district, does not exercise " 'precisely the same governmental powers over residents of [Lincoln Park (sending district) ] as it does over those residing within its [district's] limits.' " 301 F.3d at 79 (quoting *Holt*, 439 U.S. at 72 n.8). Rather, the Boonton Board exercised control over all school matters K-12 for Boonton residents, but only affected Lincoln Park residents on matters involving the high school. Furthermore, the Lincoln Park Board maintained exclusive control over the education of its children from K-8. *English*, 301 F.3d at 79.

The same arrangement applies to the present case. The Somerville Board only exercises authority over Branchburg residents, including the Kovacs Plaintiffs, with regard

to the Somerville High School. Branchburg is free to control the education of its children from K-8, and the reach of Somerville's powers over Branchburg is limited exclusively to the High School. As in *English*, this is not a situation where the powers of Somerville are co-extensive with regard to both Somerville and Branchburg residents. Consequently, as in *English*, we will evaluate the constitutionality of the send-receive statute as applied to Branchburg under rational basis review.

The above analysis is also dispositive of the merits. Our holding in *English* that a state may limit the representation of non-residents on the receiving school board as long as the receiving board exercises a lesser level of control over the non-residents compared to residents, *English*, 301 F.3d at 79, is fully applicable here. The fact that Branchburg cannot sever its relationship with Somerville does not alter our analysis. Whether or not a severance is possible, Somerville still exercises extraterritorial powers over Branchburg "only with respect to their high school-aged children." *Id.* That reasoning was the essence of the rejection in *English* of the constitutional challenge based on the one person, one vote principle. Branchburg's inability to sever the relationship does not affect the limited nature of Somerville's extraterritorial powers.

Branchburg argues that the impossibility of severance is important for determining whether the New Jersey legislature had a rational basis for limiting sending districts' representation on receiving districts' school boards. Appellants point to our language in *English* where, after concluding

that "New Jersey has legitimate reasons for limiting the representation of [the sending district]," we added, "there is always the possibility that [the sending district] might sever its relationship [with the receiving district]." *English*, 301 F.3d at 80. Based on this language, Branchburg argues that its inability to sever the relationship distinguishes it from *English* because the resulting perma-nence of its relationship with Somerville gives Branchburg residents the same vested long-term interest in the Somerville High School as Somerville residents.

It is evident from reading the *English* opinion that our statement about the possibility of severance was not the necessary predicate of the ultimate holding. There were two references to the possibility of severance in the *English* opinion, but both were in the context of the legislature's legitimate reasons for limiting the sending district's representation on the receiving district's school board. *See English*, 301 F.3d at 80, 82. However, the possibility of severance was not the only legitimate basis cited for the statute's structure. Rather, we also noted that a school board's broad authority over the entire school district, authority that goes well beyond matters affecting the high school, warranted the limited representation of a sending district. *Id.* at 80, 82. We stated, "we do not consider it irrational for New Jersey to limit the power of the sending district's representative so as to preserve the receiving district's control over matters that affect the school district as a whole." *Id.* at 82. We went on to state that although the statute may not create the optimal system from a " 'political science standpoint,' " New Jersey is only required to have a legitimate and rational basis for

its legislation. *Id.* at 82-83 (quoting *Holt*, 439 U.S. at 73). Thus, there are other legitimate and rational justifications for limiting a sending district's representation on a receiving district's school board.

Our conclusion here that the possibility of severance does not counsel a different result than in *English* is consistent with the holdings in both *Holt* and *Little Thunder*. In *Holt*, Tuscaloosa exerted its police and sanitary regulations and business licensing requirements over Holt, a small town located beyond Tuscaloosa's city limits. 439 U.S. at 61-62. There was no indication that Tuscaloosa's powers were limited in time or that Holt could take action to escape from Tuscaloosa's extraterritorial powers. However, despite the seemingly permanent nature of Holt's situation, the Supreme Court held that it did not violate the one person, one vote principle of the Fourteenth Amendment. *Id.* at 68-70.

Conversely, in *Little Thunder*, under state law an unorganized county was made subject to the powers of an "attached" organized county. 518 F.2d at 1254. Although the unorganized county could petition the state for recognition as an "organized" county and escape the attached county's authority, the Court of Appeals for the Eighth Circuit held that the statute violated the Fourteenth Amendment. *Id.* at 1258. As long as a governmental unit was exerting power over non-residents that was different from the authority that it had over its own residents, the limitation of representation did not offend one person, one vote. Thus, as in *English*, the temporary or permanent nature of the authority exerted over non-residents was not a deciding factor.

**D. The Kovacs Plaintiffs**

The Kovacs Plaintiffs explain that while the Branchburg Appellants seek proportional representation, they are seeking the right to vote on Somerville High School budgets and referenda affecting the High School. They state that because this relief was not sought in *English*, where the relief sought was limited to additional representation on the school board, their case is not governed by *English*. This is not persuasive. They fail to provide any legal or logical justification why the type of representation sought should affect our conclusion that the New Jersey send-receive statute does not offend the one person, one vote principle.

The fact that the Kovacs Plaintiffs are seeking the franchise for Somerville school budget and referenda votes does not distinguish it from the analysis in *English*. Indeed, the relief they seek is in some respects greater than that sought by the Branchburg Appellants and in *English*. When Somerville residents vote on the budget and referenda, their vote affects much more than just the High School. The annual budget and referenda, by their nature, usually involve comprehensive and long-term planning that goes far beyond merely the functioning of the High School. For example, any referendum may have an impact on Somerville's entire educational plan and infrastructure, while it would not have an effect on Branchburg's K-8 educational system. Moreover, the inclusion of Branchburg residents in Somerville's regular votes on school budgets and referenda would be an even greater intrusion than increased representation on the Somerville Board. Somerville residents, through budget and referenda votes, do not exercise

" 'precisely the same governmental powers' " over Branchburg residents as they do over themselves. *English*, 301 F.3d at 79 (quoting *Holt*, 439 U.S. at 72 n.8). It follows that the constitutional objection by the Kovacs Plaintiffs to the New Jersey statute must also be rejected for the reasons set forth above.

## IV.

## CONCLUSION

For the reasons set forth above, we will reverse the District Court's grant of summary judgment to plaintiffs and remand to the District Court with directions to grant summary judgment for the defendants.

A True Copy:
Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

## APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, DATED AND FILED JULY 2, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No: 98-5557 (AET)
and 99-822 (AET) (Consol.)

BOARD OF EDUCATION of the TOWNSHIP OF BRANCHBURG, GREGORY SCOTT, GERALDINE FELDMAN, PATRICIA BOWERS, ROBERT J. FULTON, JR., BETH KOVACS, CHRISTINE IHLING, STEVEN JANKOSKI,

Plaintiffs,

v.

DAVID LIVINGSTON, Somerset County Superintendent; LEO F. KLAGHOLZ, State Commissioner of Education, and THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey,

Defendants.

***MEMORANDUM AND ORDER***

*THOMPSON, U.S.D.J.*

This matter is before the Court on plaintiffs' motion for reconsideration of the Court's May 22, 2001 decision which

ordered that the Branchburg Board of Education appoint six (6) members to the Somerville Board of Education. The motion is opposed by the New Jersey Department of Education and the Board of Education of the Borough of Somerville. The Court decided this motion after considering the written submissions of the parties pursuant to Federal Rule of Civil Procedure 78. For the reasons stated herein, plaintiffs' motion will be DENIED.

Before reaching the merits of a motion for reconsideration, a court must decide whether the arguments are properly raised under Local Rule 7.1(g). The motion may address only those matters of fact or issues of law which were presented to, but not considered by, the court in the course of making the decision at issue. *See SPIRG v. Monsanto Co.*, 727 F. Supp. 876, 878 (D.N.J.), *aff'd*, 891 F.2d 283 (3d Cir. 1989). Thus, matters may not be introduced for the first time on a reconsideration motion. *See, e.g., Resorts Int'l, Inc. v. Greate Bay Hotel and Casino, Inc.*, 830 F. Supp. 826, 831 (D.N.J. 1992); *Egloff v. New Jersey Air Nat'l Guard*, 684 F. Supp. 1275, 1279 (D.N.J. 1988). Absent unusual circumstances, a court should reject new evidence which was not presented when the court made the contested decision. *Resorts Int'l*, 830 F. Supp. at 831 n.3. Moreover, Rule 7.1(g) does not allow parties to restate arguments which the court has already considered; rather, a difference of opinion with the court's decision should be dealt with through the normal appellate process. *Florham Park Chevron, Inc. v. Chevron U.S.A., Inc.*, 680 F. Supp. 159, 162 (D.N.J. 1988); *See also Chicosky v. Presbyterian Medical Ctr.*, 979 F. Supp. 316, 318 (D.N.J. 1997); *NL Industries, Inc. v. Commercial Union Ins. Co.*, 935 F. Supp. 513, 516

(D.N.J. 1996) ("Reconsideration motions . . . may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.").

In addition, the court will grant a motion for reconsideration only if the movant establishes that the court overlooked dispositive factual matters or controlling legal decisions. *See Starr v. JCI Data Processing, Inc.*, 767 F. Supp. 633, 635 (D.N.J. 1991). Relief under Rule 7.1(g) will be granted "very sparingly." *Maldonado v. Lucca*, 636 F. Supp. 621, 630 (D.N.J. 1986). With these standards in mind, the Court will now turn to plaintiffs' motion for reconsideration.

Plaintiffs argue that the Court's remedy is *per se* unconstitutional and that the Court "overlooked controlling decisions of law which clearly show that the Court's remedial order is unconstitutional." Primarily, plaintiffs cite to decisions discussing permissible and impermissible maximum population deviations.

In reaching its prior decision, the Court considered all relevant case law and all matters of fact presented to the Court. The Court concludes that its decision is fully consistent with constitutional precedent. Although the Court recognizes that plaintiffs disagree with the May 22, 2001 decision, the Court will not reconsider arguments and legal precedent that were previously presented and considered. The proper forum for plaintiffs' arguments is not this Court, but the Third Circuit Court of Appeals. Therefore, for these reasons and for good cause shown,

*Appendix B*

IT IS on this 2nd day of July 2001,

ORDERED that plaintiffs' motion for reconsideration is DENIED.

s/ Anne E. Thompson
ANNE E. THOMPSON, U.S.D.J.

## APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, DATED MAY 21, 2001 AND FILED MAY 22, 2001

**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW JERSEY**

Civil No: 98-5557 (AET)
and 99-822 (AET) (Consol.)

BOARD OF EDUCATION of the TOWNSHIP OF BRANCHBURG, GREGORY SCOTT, GERALDINE FELDMAN, PATRICIA BOWERS, ROBERT J. FULTON, JR., BETH KOVACS, CHRISTINE IHLING, STEVEN JANKOSKI,

Plaintiffs,

v.

DAVID LIVINGSTON, Somerset County Superintendent; LEO F. KLAGHOLZ, State Commissioner of Education, and THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey,

Defendants.

*OPINION*

*THOMPSON, U.S.D.J.*

This matter is before the Court on the motion of plaintiffs, the Board of Education for the Township of Branchburg,

*Appendix C*

Gregory Scott, Geraldine Feldman, Patricia Bowers, and Robert J. Fulton, Jr. ("Branchburg plaintiffs"), for a preliminary injunction restraining the Board of Education for the Borough of Somerville ("Somerville Board") from taking any further official action until the Coat approves a constitutionally permissible remedy and/or implements plaintiffs' proposed interim remedial plan. David Livingston, Somerset County Superintendent, and Leo F. Klagholz, New Jersey State Commissioner of Education ("State defendants") and the Somerville Board oppose plaintiffs' motion and in addition, the Somerville Board has filed a cross-motion for a stay of implementation of any remedy pending appeal.

## I. BACKGROUND

In the Court's Opinion entered September 7, 2000, the Court concluded that the Representation Statute, N.J.S.A. 18A:38-8.2, is unconstitutional as applied "because it denies Branchburg citizens the right to elect representatives to oversee the high school education of their children in contravention of the 'one person, one vote' principle." The Court stated in support of its conclusion that the United States Supreme Court has consistently held that citizens have a substantial interest and fundamental right to exercise their right to vote for local school board members where those officials are chosen by the electorate at large. *See Hadley v. Junior College Dish*, 397 U.S. 50 (1969). The Court held that Branchburg's citizens have a substantial interest in the high school education of their children, as well as a right to elect those who will oversee that education. Therefore, the Court concluded, the principle of "one person, one vote" applies in this case.

*Appendix C*

The Court recognized that the New Jersey Legislature and New Jersey's Commissioner of Education are the proper parties to formulate appropriate remedies in this case and requested that the Commissioner of Education recommend, within sixty (60) days, a constitutionally permissible manner for resolving this problem until the New Jersey Legislature can formulate a legislative solution.

On October 6, 2000, the State defendants filed a Notice of Appeal with the Third Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(a), which allows immediate appeals from orders granting or denying an injunction. On October 13, 2000, the State defendants filed a motion for a stay of the directives contained in the Court's September 7, 2000 Opinion pending appeal pursuant to FED. R. CIV. P. 62(c), which likewise applies only when "an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction." On October 19, 2000, all consolidated plaintiffs filed a motion in the Third Circuit seeking to dismiss the appeal by State defendants for lack of appellate jurisdiction.

On October 26, 2000, the Somerville Board filed a cross-motion requesting that the Court amend its September 7, 2000 Order to include a 28 U.S.C. § 1292(b) statement and a stay pending appeal. On November 1, 2000, the Court entered a letter order granting the State defendants' request for a one week extension of the 60-day time period contained in the September 7, 2000 Opinion. Thus, the State defendants were given until November 13, 2000 to fulfill the Court's request that it recommend a constitutionally permissible resolution to this matter.

*Appendix C*

By Order entered November 29, 2000, the Court granted the Somerville Board's motion to amend the September 7, 2000 Order to certify the Court's decision for an interlocutory appeal and granted the Somerville Board's motion for a stay of the Court's September 7, 2000 decision pending appeal. The Court dismissed the State defendants' motion for a stay pending appeal as moot based on its rulings on the Somerville Board motions.

By order entered December 6, 2000, plaintiffs' motion to dismiss the State defendants' appeal was granted by the Third Circuit Court of Appeals. Thereafter, by order entered January 24, 2001, the Third Circuit denied the Somerville Board's petition for an interlocutory appeal.

On February 28, 2001, the Branchburg plaintiffs filed this motion for a preliminary injunction restraining the Somerville Board from taking any further official action until the Court approves a Constitutionally permissible remedy and/or implementing plaintiffs' proposed interim remedial plan. The State defendants and the Somerville Board oppose plaintiffs' motion and in addition, the Somerville Board has filed a cross-motion for a stay of implementation of any remedy pending appeal.

By letter received April 5, 2001, the Court received notice that the Third Circuit had denied the Somerville Board's petition for a rehearing *en banc*. On April 12, 2001, the Court issued an Order to Show Cause regarding the Branchburg plaintiffs' motion and vacated the stay in place pending appeal.

*Appendix C*

## II. DISCUSSION

### A. Preliminary Injunction

#### 1. *Preliminary Injunction Standard*

Injunctive relief is an "extraordinary remedy" that should only be granted in limited circumstances. *See AT&T v. Winback and Conserve Program, Inc.*, 42 F.3d 1421, 1427 (3d Cir. 1994), *cert. denied*, 514 U.S. 1103 (1995). In determining whether to grant a preliminary injunction, the Court must assess the following four factors: (1) the likelihood that the plaintiff will prevail on the merits; (2) the extent to which the plaintiff is suffering irreparable harm; (3) the extent to which the requested relief would irreparably harm the defendant; and (4) the public interest. *See New Jersey Hospital Ass'n v. Waldman*, 73 F.3d 509, 512 (3d Cir. 1995). A preliminary injunction should issue only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary relief. *See Opticians Ass'n of America v. Independent Opticians of America*, 920 F.2d 187, 192 (3d Cir. 1990).

#### 2. *Likelihood of Success on the Merits*

The court has already granted the Branchburg plaintiffs' motion for summary judgment finding that plaintiffs' Constitutional rights have been infringed by application of the Representation Statute, N.J.S.A. 18A:38.8.2. Therefore, the Court finds that plaintiffs' have a likelihood of success in the litigation. See *Waldman*, 73 F.3d at 512.

3. *Irreparable Harm*

To demonstrate irreparable harm, a moving party must demonstrate a potential harm that cannot be redressed by a legal or equitable remedy at the conclusion of the matter. *See Gruntal & Co., Inc. v. Steinberg*, 854 F. Supp. 324, 341 (D.N.J. 1994), *aff'd* 46 F.3d 1116 (3d Cir. 1994).

The Branchburg plaintiffs argue that the violation of plaintiffs' constitutional rights constitutes irreparable harm *per se*. *See Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 880 (3d Cir. 1997); *Marks v. Stinson*, 19 F.3d 873, 878-79 (3d Cir. 1994). Defendants argue that the principle of "one person, one vote" extended across district boundaries is not a well established constitutional right and therefore a violation of that right would not constitute *per se* irreparable harm. Defendants further argue that because the Court will eventually fashion some remedy by the end of the case, the Branchburg plaintiffs an not suffering irreparable harm within the meaning of *Gruntal*.

The Court finds that the principle of "one vote, one person" is a well established right and that as the Somerville Board continues to meet to establish policy and make decisions affecting the Branchburg high school pupils without adequate representation by Branchburg, the Branchburg plaintiffs are suffering and continue to suffer irreparable harm.

4. *Balance of Equities and Public Interest*

In addition, a moving party must demonstrate that the irreparable harm caused to it by the lack of an injunction

will outweigh the harm caused to the opposing party if relief is granted. *See Pappan Enterprises, Inc. v. Hardee's Food Systems, Inc.*, 143 F.3d 800, 806 (3d Cir. 1998).

The Branchburg plaintiffs argue that any administrative costs defendants must bear as a result of an injunction do not compare to the constitutional deprivations they have suffered. Defendants argue that if the Court grants a preliminary injunction restraining the Somerville Board from taking any further official action, the entire Somerville school district would be paralyzed and all Somerville students and all Branchburg high school students would be deprived of their right to a thorough and efficient education. In addition, defendants argue that if the Court imposes the Branchburg plaintiffs' proposed plan giving Branchburg a majority vote, the franchise of the Somerville voters would be seriously impacted.

The Court does not intend to issue an injunction that will result in shutting down the Somerville school district. As a result, any remedy the Court would impose would allow the Somerville Board to continue operating to fulfill its obligation to provide a thorough and efficient education to the students. Therefore, the violation of the Branchburg plaintiffs' constitutional rights outweighs any harm defendants would suffer as a result of the Court imposing the Branchburg plaintiffs' interim plan or some version of the plan. In addition, the Court finds that the public interest will be served if the constitutional rights of the Branchburg plaintiffs are protected in a manner that does not impact the Somerville and Branchburg students' rights.

*Appendix C*

**B. Proposed Remedies**

1. *Current Composition of Somerville Board*

Pursuant to N.J.S.A. 18A:38-8.2, currently the Branchburg Board appoints one (1) member to the 10 member Somerville Board. The Branchburg member is entitled to vote upon certain issues affecting the high school including capital spending and teacher dismissal. The votes of each member of the Somerville Board are equally weighted.

The Somerville Board meets a minimum of two (2) times per month in order to set long-range and short-range policy and also to see to the basic running of the school district which involves many tasks from paying bills to labor negotiations to facility maintenance. In addition, additional monthly committee meetings are held, i.e., athletics and policy committee, building and grounds committee, curriculum committee, etc.

2. *Plaintiffs' Proposed Interim Plan*

As an interim remedy until the state legislature can adequately address the problem, the. Branchburg plaintiffs propose that the Branchburg Board appoint five (5) members to the Somerville Board, each of whom would have two (2) votes on matters identified in N.J.S.A. 18A:38-8.1[1] The

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1. N.J.S.A. 18A:38-8.1 states that the representative of the sending district shall be eligible to vote on the following matters before the receiving district board of education:

(Cont'd)

Somerville Board members would continue to have one (1) vote each. The Branchburg plaintiffs' proposed plan would give Branchburg a majority vote on the issues listed in N.J.S.A. 18A:38-8.1 (10 Branchburg votes (53%) to 9 Somerville votes (47%)). Branchburg students currently comprise 55% of the Somerville district's high school student population, while students from Somerville account for 45%.

3. *N.J.S.A.18A:38-8.4*

In response to the Court's request, the New Jersey State Commissioner of Education proposed that the Court model its remedy after N.J.S.A. 18A:38-8.4 which was enacted in 1999 regarding the send-receive relationship between the Upper Township Board of Education and the Ocean City Board of Education. In that send-receive relationship, the Upper Township students comprised more than 50%

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(Cont'd)

a. Tuition to be charged in sending district by the receiving district and the bill lists or contracts for the purchase, operation or maintenance of facilities, equipment and instructional materials to be used in the education of the pupils of the sending district;

b. New capital construction to be utilized by sending district pupils;

c. Appointment, transfer or removal of teaching staff members providing services to pupils of the sending district, including any teaching staff member who is a member of the receiving district's central administration staff; and

d. Addition or deletion of curricular and extracurricular programs involving pupils of the sending district.

of the high school student population but only appointed (1) representative on the Ocean City Board of Education. Section 8.4 provides a sliding scale in which a sending district whose students comprise at least 40% of the total enrollment of pupils can have three (3) representatives on the receiving district's board of education. Section 8.4 also provides that the sending district representatives would be added in addition to the members of the receiving district's board and that the sending district representatives would be permitted to vote on those matters authorized by N.J.S.A. 18A:38-8.1. Section 8.4 was agreed on in advance by both districts and the constitutional issues regarding voter representation were not considered.

4. *The Court's Proposed Remedy*

In the Court's September 7, 2000 Opinion, the Court concluded that the principle of "one person, one vote" applies in this case. The Court father noted that defendants raised valid concerns regarding the possible remedies that might be imposed in this case. "For example, allowing Branchburg to have a controlling majority on the Somerville Board would seriously impact the franchise of Somerville voters." Op. Thompson, Sept. 7, 2000 at 6. The Court also recognized that the New Jersey Legislature and New Jersey's Commissioner of Education are the proper parties to formulate appropriate remedies in this case. *See Township of Marlboro v. Board of Educ. of the Freehold Regional High School*, 992 F. Supp. 756, 765 (D.N.J. 1998). In that light, the Court requested that the Commissioner of Education propose a remedy and also requested that the parties enter into a standstill agreement as to the operation of the Somerville

Board which "would not delay or interfere with the ongoing education program of the districts." Op. Thompson, Sept. 7, 2000 at 6-7. The parties have been unable to agree on a standstill agreement and the Branchburg plaintiffs now seek an injunction implementing a remedial plan.

The Court notes that while Branchburg students currently comprise 55% of the Somerville district's high school student population, many issues affecting the Branchburg high school students also affect the entire Someville school district including the Somerville grammar schools and middle school which do not accept Branchburg students. For example, pursuant to N.J.S.A. 18A:38-8.1, the Branchburg representative is permitted to vote on issues regarding the Somerville district central administrative staff. Such decisions affect the entire Somerville school district of which, Branchburg does not possess a majority of the total pupil population.

The Court further notes that NJ.S.A. 18A:38-8.4 does not specifically apply to this situation. The statute was enacted with the prior approval of both districts and the issues of voter representation were not considered. Under the Section 8.4 sliding scale, Branchburg would appoint three (3) representatives to the Somerville Board which would constitute 25% of the Somerville Board votes. However, while such a scheme gives Branchburg more representation than it currently has on the Somerville Board, a large disparity in voter representation would still exist in stark contradiction to the Court's finding that the principle of "one person, one vote" applies in this case.

The Court notes that the send-receive relationship differs from the regional district situation. There is an underlying contract at issue here but there are also constitutional rights at stake. The current situation is complex and the Court cannot conceive of a perfect solution. As a result, the Court will order that Branchburg appoint six (6) members to the Somerville Board to vote on the matters listed in N.J.S.A. 18A:38-8.1. The six (6) Branchburg members will be in addition to the nine (9) Somerville members. As a result, the Branchburg members will control 40% of the votes on the matters affecting the Branchburg high school students as listed in Section 8.1. Therefore, the Somerville members will maintain a majority vote and the Branchburg district will have significantly more representation on issues affecting their high school students.

**C. Defendants' Motion for a Stay Pending Appeal**

Pursuant to FED. R. CIV. P. 62(c), the Somerville Board seeks a stay of the Court's remedial order pending appeal. To warrant a stay pending appeal, the Somerville Board must demonstrate: (1) the likelihood that they will prevail on the merits of the appeal; (2) irreparable injury absent a stay; (3) other parties will not be harmed by the stay; and (4) the public interest favors granting the stay. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Kawecki Berylco Industries, Inc. v. Fansteel, Inc.*, 517 F.Supp. 539, 540 (E.D. Pa. 1981), *aff'd* 676 F.2d 686 (3d Cir. 1982).

The Court finds that the Somerville Board has failed to show irreparable harm absent a stay. Under the Court's remedial plan, the Somerville Board maintains a majority

vote and the Somerville Board may continue to operate. In addition, as the Somerville Board continues to meet to establish policy and make decisions affecting the Branchburg students, staying the implementation of the Court's remedial plan will allow the irreparable harm the Branchburg plaintiffs demonstrated in support of the motion for preliminary injunction to continue. Therefore, the Somerville Board's motion for a stay pending appeal will be denied.

## III. CONCLUSION

For these reasons and for good cause shown, the Branchburg plaintiffs' motion for a preliminary injunction will be granted and the Somerville Board's motion for a stay pending appeal will be denied. As a result, the Court will order that Branchburg appoint six (6) members to the Somerville Board who will be permitted to vote on matters affecting the Branchburg high school student listed as in N.J.S.A. 18:38-8.1. An appropriate Order will be filed with this Opinion.

Dated: 5/21/01

*Appendix C*

**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW JERSEY**

Civil No: 98-5557 (AET)
and 99-822 (AET) (Consol.)

BOARD OF EDUCATION of the TOWNSHIP OF BRANCHBURG, GREGORY SCOTT, GERALDINE FELDMAN, PATRICIA BOWERS, ROBERT J. FULTON, JR., BETH KOVACS, CHRISTINE IHLING, STEVEN JANKOSKI,

Plaintiffs,

v.

DAVID LIVINGSTON, Somerset County Superintendent; LEO F. KLAGHOLZ, State Commissioner of Education, and THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey,

Defendants.

*ORDER*

For the reasons set forth in the accompanying Opinion, and for good cause shown,

IT IS on this 21st day of May, 2001,

ORDERED that the motion for a preliminary injunction filed by the Branchburg plaintiffs is GRANTED; and it is further

*Appendix C*

ORDERED that the Somerville Board's motion for a stay of the implementation of the Court's interim remedial plan pending appeal pursuant to Fed. R. Civ. P. 62 (c) is DENIED; and it is further

ORDERED that the following interim remedial plan be implemented until the New Jersey state legislature can pass new legislation to address this matter:

- Branchburg Board of Education appoints six (6) members to the Somerville Board of Education.

- Each Branchburg member receives one (1) vote on issues affecting the Branchburg high school students as listed in N.J.S.A. 18A:38.8.1.

- The six (6) Branchburg members are added to the Somerville Board of Education in addition to the nine (9) Somerville members.

- Each Somerville member continues to receive one (1) vote each on all issues before the Somerville Board.

s/ Anne E. Thompson
ANNE E. THOMPSON, U.S.D.J.

**APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED SEPTEMBER 5, 2000 AND FILED SEPTEMBER 7, 2000**

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No: 98-5557 (AET) (Consol.)

BOARD OF EDUCATION of the TOWNSHIP OF BRANCHBURG, GREGORY SCOTT, GERALDINE FELDMAN, PATRICIA BOWERS, ROBERT J. FULTON, JR., BETH KOVACS, CHRISTINE IHLING, STEVEN JANKOSKI,

Plaintiffs,

v.

DAVID LIVINGSTON, Somerset County Superintendent; LEO F. KLAGHOLZ, State Commissioner of Education, and THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey,

Defendants.

*OPINION*

*THOMPSON, U.S.D.J.*

These matters are before the Court on cross motions for summary judgment filed by all parties. At issue in this case

is a New Jersey statute regarding representation on local school boards and the doctrine of "one person, one vote". The Court decided these matters after hearing oral argument on July 6, 2000.

## BACKGROUND

The facts of this case are not in dispute. Public schools in New Jersey are organized into geographic areas called school districts. Each school district is required to provide education, at its own expense, to the students domiciled within the district. However, where a given district does not have high school facilities, that district must designate a high school outside the district to receive its high school students, pursuant to the following statutory language:

> The board of education of every school district which lacks high school facilities within the district and has not designated a high school or high schools outside of the district for its high school pupils to attend shall designate a high school or high schools of this state for the attendance of such pupils.

N.J. STAT. ANN. § 18A:38-11. Another New Jersey statute permits school districts to receive such students. N.J. STAT. ANN. § 18A:38-8. When two school districts enter into an agreement whereby the students of the sending district attend school in the receiving district, such an agreement is commonly called a send-receive relationship.

*Appendix D*

When sufficient numbers of students from one district attend school in another district, the sending district is entitled to representation on the receiving district's school board as follows:

> A school district which is sending pupils to another school district pursuant to § 18A:38-8 shall have representation on the board of education of the receiving school district as follows:
>
> a. (1) If the pupils of the sending district comprise less than 10 percent of the total enrollment of the pupils in the grades of the receiving district in which the pupils of the sending district will be enrolled, the sending district shall have no representation on the receiving district board of education.
>
> (2) If the pupils of the sending district comprise at least 10 percent of the total enrollment of the pupils in the grades of the receiving district in which the pupils of the sending district will be enrolled, the sending district shall have one representative on the receiving district board of education.

N.J. STAT. ANN. § 18A:38-8.2 (the "Representation Statute" or "Statute").

As an alternative to creating a send-receive relationship, a school district may also seek to form a regional school district with other area school districts. A regional school

district is a separate political entity which is jointly controlled by its constituent districts. N.J. STAT. ANN. § 18A:13-4, 13-5, 13-8. School districts must follow a statutory procedure to forma regional school district, which includes consultation with the State Commissioner of Education and a referendum vote. N.J. STAT. ANN. § 18A:13-34.

In 1956, the Branchburg Board and the Somerville Board entered into a send-receive relationship. This agreement allowed students from Branchburg to attend Somerville's high school and provided for tuition payments from Branchburg to Somerville to cover the education costs for those students. Branchburg entered into this Agreement because it did not have a high school in its borders, while Somerville had a high school large enough to accommodate students from both the Branchburg and Somerville districts.

The parties agree that during the 1997-98 school year, Branchburg sent 432 students to attend high school in the Somerville district. That same year, 366 students domiciled in Somerville went to high school in their own district. Thus, Branchburg students accounted for approximately 55% of the Somerville district's high school student population, while students from Somerville accounted for 45%. The parties also agree that these percentages remain virtually the same today.

Under the Representation Statute, given this ratio of students, the Branchburg Board appointed one member to the 10 member Somerville Board. The Branchburg member is entitled to vote upon certain issues, including capital

spending and teacher dismissal. N.J. STAT. ANN. § 18A:38-8.1. The votes of each member of the Somerville Board are equally weighted.

Plaintiffs are requesting a declaration that N.J.S.A. 18A:38-8.2 is unconstitutional as it applies to the send-receive relationship between Branchburg and Somerville. More specifically, plaintiffs contend that the statute is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, Sections 1 and 5 of the New Jersey Constitution.

## DISCUSSION

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, admissions, and affidavits show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). In this case, the Court will draw all reasonable inferences in plaintiffs' favor, and will accept plaintiffs' evidence when considering the merits of the summary judgment motions. *See Pollock v. American Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir. 1986).

Defendants argue that before the Court considers the merits of this case, it should first consider whether plaintiffs should be constitutionally estopped from pursuing their claims. Defendants assert that it would be improper to allow plaintiffs to challenge the Representation Statute while still enjoying the benefits of the Statute, such as representation on the Somerville Board.

*Appendix D*

Constitutional estoppel does not attach where a given plaintiff enjoys a limited benefit under a challenged statute or government program, while the plaintiff is simultaneously suffering constitutional harm. *See S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752, 768 (11th Cir. 1991) (subsequent history omitted). In this case, plaintiffs have utilized the Representation Statute in the past to send high school students to Somerville. However, as will be seen below, the Representation Statute now burdens plaintiffs' voting rights, and therefore, plaintiffs are permitted to challenge the Statute.

The Court concludes that the Representation Statute is unconstitutional as applied because it denies Branchburg citizens the right to elect representatives to oversee the high school education of their children in contravention of the "one person, one vote" principle. The United States Supreme Court has consistently held that citizens have a substantial interest and fundamental right to exercise their right to vote for local school board members where those officials are chosen by the electorate at large. *See generally Hadley v. Junior College District*, 397 U.S. 50 ( 1969).

Branchburg's citizens have a substantial interest in the high school education of their children, as well as a right to elect those who will oversee that education. The principle of "one person, one vote" applies in this case. Although Branchburg's citizens do not live within the Somerville School District, their right to elect a local school board to oversee the education of their children who attend high school in Somerville is not diminished. This is not a case where the Somerville Board's activities have an "indirect extraterritorial

effect" on the citizens of Branchburg and their children. *See Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 69-70 (1978). Nor is this a case where the Somerville Board exercises only limited powers over the educational lives of its students. The Somerville Board is the governing body for the entire Somerville School District, including Somerville's high school. *See Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098, 1102-03 (7th Cir. 1995) (considering local school counsels which exercised limited powers over a single school with oversight from Chicago school board).

The parties agree that the Somerville Board makes crucial decisions regarding curriculum, hiring and firing of teachers, supervision and discipline of students, and facilities management. In addition, Branchburg's citizens pay a per pupil cost to Somerville which is based, at least in part, on debt service approved by Somerville's voters. These factors have more then an incidental effect on Branchburg citizens. They *directly* impact the future of Branchburg's children and the amount of money flowing from Branchburg to Somerville. In fact, Branchburg and Somerville citizens both have an identical interest in the education provided at Somerville's High School. The geographic political boundary between the Somerville and Branchburg Districts does nothing to change this identical level of interest. *See Evans v..Cornman*, 398 U.S. 419, 426 (1969) (noting residents of federal enclave had just as much interest in elections as residents living in state surrounding enclave); *Little Thunder v. State of South Dakota*, 518 F.2d 1253, 1255-56 (8th Cir. 1975).

*Appendix D*

The Court is aware that individual states should be given room to experiment with the allocation of state and local power. *See Holt*, 439 U.S. at 71. However, in this case, each representative from Somerville on Somerville's Board represents approximately 1,258 people, while the single Branchburg representative represents 14,782 people. This representation scheme appears to violate the principle of "one person, one vote", and would therefore be unconstitutional.

Defendants have raised valid concerns regarding the possible remedies that might be imposed in this case. For example, allowing Branchburg to have a controlling majority on the Somerville school board would seriously impact the franchise of Somerville voters. The Court also recognizes that the New Jersey Legislature and New Jersey's Commissioner of Education are the proper parties to formulate appropriate remedies in this case. *See Township of Marlboro v. Board of Educ. of the Freehold Regional High School*, 992 F. Supp. 756, 765 (D.N.J. 1998).

In light of this, the Court will ask the Commissioner of Education to recommend within 60 days a constitutionally permissible manner for resolving this problem until the New Jersey Legislature can formulate a legislative solution. The Court will also ask the parties to draft a mutually acceptable standstill agreement as to the operations of the Somerville Board, which will not delay or interfere with the ongoing education program of the districts. Plaintiffs' request for attorneys fees will be considered at a later time.

*Appendix D*

## CONCLUSION

For the reasons given above, plaintiffs' motions for summary judgment will be granted and defendants' motions for summary judgment will be denied. An appropriate Order will be filed with this Opinion.

Dated: Sept. 5, 2000

*Appendix D*

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No: 98-5557 (AET) (Consol.)

BOARD OF EDUCATION of the TOWNSHIP OF BRANCHBURG, GREGORY SCOTT, GERALDINE FELDMAN, PATRICIA BOWERS, ROBERT J. FULTON, JR., BETH KOVACS, CHRISTINE IHLING, STEVEN JANKOSKI,

Plaintiffs,

v.

DAVID LIVINGSTON, Somerset County Superintendent; LEO F. KLAGHOLZ, State Commissioner of Education, and THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey,

Defendants.

*ORDER*

For the reasons given in the Opinion filed with this Order,

It is on this 5th day of Sept., 2000,

**ORDERED** that plaintiffs' motions for summary judgment are **GRANTED**; and it is further,

*Appendix D*

**ORDERED** that defendants' motions for summary judgment are **DENIED**.

s/ Anne E. Thompson
ANNE E. THOMPSON, U.S.D.J.

Supreme Court, U.S.
FILED
APR 7 2003
CLERK

(2)

No. 02-1302

**In the**
**Supreme Court of The United States**

BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG
Petitioner,
v.

THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE; and WILLIAM L. LIBRERA, COMMISSIONER OF EDUCATION,
Respondents.

On Petition for a Writ of Certiorari To The United States Court of Appeals for the Third Circuit

Brief in Opposition on Behalf of Respondent, William L. LIBRERA, Commissioner of Education

EDWARD M. NEAFSEY
ACTING ATTORNEY GENERAL OF NEW JERSEY
RJ HUGHES JUSTICE COMPLEX
P.O. Box 112
Trenton, NJ 08625
(609) 633-8197

NANCY KAPLEN
Assistant Attorney General

SARAH G. CROWLEY
Deputy Attorney General
Counsel of Record
On the Brief

21 pp

## COUNTERSTATEMENT OF QUESTION PRESENTED

1. The Third Circuit Court of Appeals properly applied Holt in holding that the one person, one vote principle is not applicable where one school district enters into a contract (the sending district) to send its high school students across geographic boundaries to another school district (the receiving district) for educational services for these students and there are no conflicts or exceptional circumstances presented in this case.

## TABLE OF CONTENTS

COUNTERSTATEMENT OF QUESTION PRESENTED.....i

TABLE OF AUTHORITIES.....ii

COUNTERSTATEMENT OF THE CASE .....1

I. Introduction.....1

II. Procedural Background .....4

ARGUMENT

THE THIRD CIRCUIT PROPERLY APPLIED THE HOLT CASE

A. There Is No Conflict Between Holt And Branchburg, As They Both Involved A Recognition That Valid Geography-Based Restrictions On Voting Do Not Offend The Principle Of One Person, One Vote.....7

B. There Is No Recurring Question Of Exceptional Importance In This Case.....14

CONCLUSION.....16

## TABLE OF CITATIONS

## CASES CITED


Baker v. Carr, 369 U.S. 186 (1962).....8

The Board of Education of the Township of Branchburg v. David Livingston, et al, Civil Action No.98-557 (September 7, 2000).....*passim*

English v. Board of Ed. Of the Town of Boonton, et al., 135 F. Supp. 2d 588 (D.N.J. 2001), rev'd, 301 F. 3d 69 (2002), *cert. denied*, 123 S. Ct. 852 (2003).....*passim*

Evans v. Cornman, 398 U.S. 419(1970).....12

First Nat. Bank of Ariz. v. Cities Service Co., 391 U.S. 253 (1968).....7

Hadley v. Junior College Dist. of Metropolitan Kansas City, 397 U.S. 50 (1970).....8

Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978).....*passim*

Jefferson v. Hackney, 406 U.S. 535 (1972).....9

Little Thunder v. South Dakota, 518 F. 2d 1253 (8th Cir. 1975).....8

Mixon v. Ohio, 193 F. 3d 389(6th Cir. 1999) .....10

Reynolds v. Sims, 377 U.S. 533 (1964).....8

Romer v. Evans, 517 U.S. 620, 632 (1996).....9

**NEW JERSEY STATUTES CITED**

N.J.S.A. 18A:38-8.2.....1, 2, 3

N.J.S.A. 18A:38-1.....1

N.J.S.A. 18A:38-19.....2

N.J.S.A. 18A:38-13.....2, 3

**NEW JERSEY REGULATIONS CITED**

N.J.A.C.. 6A:23-3.1.....6

**UNITED STATES STATUTE CITED**

28 U.S.C. §1254(l) .....7

**RULES CITED**

Fed. R. Civ. P. 12(b)(6).....4

N.J. Rules of App. P 2:2-3(2).....4

## COUNTERSTATEMENT OF THE CASE

I. Introduction

The instant matter involves the boards of education of two public school districts, Branchburg and Somerville , which are engaged in a send-receive relationship. Pursuant to this relationship, Branchburg has a contract with Somerville to send its high school students to Somerville High School for instruction. In return, Branchburg pays tuition to Somerville. This relationship was voluntarily entered into by the two school districts in 1956. Pursuant to N.J.S.A. 18A:38-13, a district my petition to sever the relationship. The petitioner in this case has not sought to sever the relationship since 1979. Pursuant to State law, Branchburg is permitted to have one representative on the Somerville Board of Education to vote on high school issues. N.J.S.A. 18A:38-8.2.

The petitioner in this action is the Branchburg Board of Education.* Petitioner seeks to have N.J.S.A. 18A:38-8.2 declared unconstitutional, "as applied" on the ground that Branchburg residents are being deprived of adequate representation on the Somerville Board of Education for high school issues in violation of the federal constitutional principle of "one person, one vote." Branchburg students constitute 53 percent of the Somerville High School population and Branchburg's population as a whole amounts to more than 50 percent of the combined populations of the towns.

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*The Kovacs Plaintiffs sought the right to vote on the Somerville school budget and referenda. Their argument was rejected by the District Court as well as the Third Circuit Court of Appeals and they did not petition this Court for Certiorari.

The New Jersey Legislature requires public school districts to educate all students domiciled within their district. N.J.S.A. 18A:38-1. Pursuant to this authority, districts without high schools may choose to contract with schools outside of their boundaries for its students to attend instead of building a high school within its district to provide educational services to its students. The "consent" of the school district receiving these students (the receiving district) is an essential component of this relationship. If both districts agree to enter into a send-receive relationship, the sending district must pay tuition to the receiving school district for each student sent. N.J.S.A. 18A:38-19. The statute further provides for limited representation by the sending district on the receiving district's board of education.

Pursuant to N.J.S.A. 18A:38-8.2:

> A school district which is sending pupils to another school district pursuant to N.J.S.A. 18A:38-8 shall have representation on the board of education of the receiving school district as follows:
>
> a.(1) If the pupils of the sending district comprise less than 10 percent of the total enrollment of the pupils in the grades of the receiving district in which the pupils of the sending district will be enrolled, the sending district shall have no representation on the receiving district board of education.
>
> (2) If the pupils of the sending district comprise at least 10 percent of the total enrollment of the pupils in the grades of the receiving district in which the pupils of the

> sending district will be enrolled, the sending district shall have one representative on the receiving district board of education.

Once a send-receive relationship is established, it may be terminated pursuant to N.J.S.A. 18A:38-13. This statute, which was enacted in substantially the same form in 1933, but amended in 1944, 1956, 1967 and 1986, provides that before the relationship may be severed, a feasibility study as to whether severance will be allowed must be conducted and submitted to the Commissioner of the Department of Education who will

> make equitable determinations based upon consideration of all the circumstances, including educational and financial implications for the affected district, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population for the districts. N.J.S.A. 18A:38-13.

It is important to note, that Branchburg has not sought severance since 1979, and currently has no severance petition pending. 14a. Furthermore, the feasibility studies which petitioner relies upon did not examine the current ability to sever the send-receive relationship. 15a. Rather they looked at the feasability of a regional or limited purpose regional school district. N.J.S.A. 18A:38-13. If a recent severance application had been submitted, an administrative process would have been instituted. As described above, this process includes the submission of a feasibility study, and a determination by the Commissioner as to whether severance is allowable. Upon a determination by the Commissioner, petitioner would have appeal rights to the State Board of

Education and ultimately to the New Jersey Appellate Division and Supreme Court. N.J.S.A. 18A:38-13. N.J. Rules of App. P. 2:2-3(2).

Petitioner argues, in essence, that parents are required by state law to send their children to school in a neighboring school district. Such a statement is inaccurate particularly in light of the fact that petitioner has not sought to sever the relationship for 23 years. Additionally, petitioner fails to mention that other options are available to parents such as private school or home schooling.

II. Procedural History

Instead of seeking severance through an administrative process, the petitioner filed a complaint in New Jersey District Court on or about December 8, 1998 seeking to have N.J.S.A. 18A:38-8.2 declared unconstitutional, "as applied," on the ground that Branchburg residents are being deprived of adequate representation on the Somerville Board of Education in violation of the Equal Protection Clause of the United States Constitution and the New Jersey Constitution. 45a.

The State filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6). The petitioner then filed a motion for summary judgment. Thereafter, the Somerville Board filed a cross-motion for summary judgment. 46a. On September 5, 2000, the district court issued an opinion declaring the representation statute unconstitutional as applied. 45a. The district court found that the statute denied Branchburg citizens the right to elect representatives to oversee the high school education of their children in violation of the one person, one vote principle. 45a. On May 22, 2001 and July 2, 2001, the district court entered interim remedial orders

increasing Branchburg's representation on the Somerville Board of Education. 30a and 26a. Pursuant to the court's May 22, 2001 Order, Branchburg has 6 members on the board in addition to Sommerville's 9 members. 40a.

Branchburg sought appellate review of the District Court's Orders of May 22, 2001 and July 2, 2001 limiting the interim relief to the addition of six members to the Somerville Board. The Commissioner of Education and Somerville cross-appealed the district court's orders of September 4, 2000, May 22, 2001 and July 2, 2001 granting Branchburg's summary judgment and instituting of the interim remedial plan. 8a.

On August 2, 2002, the Third Circuit Court of Appeals decided the companion case of English v. Board of Education of the Town of Boonton, 301 F. 3d 69, 72 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 852 (2003).** In English, the Third Circuit reversed the district court and held that "valid geography-based restrictions on voting do not offend the principle of one person, one vote." English, supra, 301 F. 3d 69, 72 (3d Cir. 2002), *cert. denied*, 125 S .Ct. 852 (2003). The court further found that such restrictions are not subject to a strict scrutiny standard and must only bear some rational relationship to a legitimate state purpose. In reaching this conclusion, the Third Circuit Court of Appeals relied upon Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 74 (1978) wherein this Court held that "a government unit may

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**The cases were not consolidated due to the "as applied" challenges in each case and the minor factual distinctions between the two districts. However, the Third Circuit considered the identical issue of whether the one person, one vote principle is applicable where one school district enters into a contract (the sending district) to send its high school students across geographic boundaries to another school district (the receiving district) for educational services for these students.

legitimately restrict the right to participate in its political process to those who reside within its borders." The Petitioner for Writ of Certiorari filed in English was denied on January 10, 2003. English, supra, 301 F. 3d 69, 72 (3d Cir. 2002), *cert. denied*, 125 S .Ct. 852 (2003).

On December 4, 2002, the Third Circuit Court of Appeals reversed the district court in Branchburg and held that although Branchburg had sought severance, this did " not counsel a different result than in English," and thus, the geography-based restrictions on voting in Branchburg did not offend the principle of one person, one vote. 23a. Petitioner had contended that the potentially permanent nature of the relationship in Branchburg rendered English and Holt inapplicable. However, this argument was not persuasive because, as noted by the Third Circuit, Holt, likewise had no potential to end its relationship and the control was even more onerous.*** As such, Holt was applicable and the one person, one vote principle of the Fourteenth Amendment was not offended. 23a.

The court below reasoned that the Somerville Board only exercises authority over Branchburg residents with regard to the Somerville High School. Branchburg is free to control the education of its children from K-8, and the reach of Somerville's powers over Branchburg is limited exclusively to the high school. 21a . Branchburg pays only the "actual cost" of tuition of high school students, which does not include the capital improvements for the school district. N.J.A.C. 6A:23-3.1. Further, as in English, the

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***This case involves a contractual relationship that is not unique, nor does it involve the right to tax as petitioner argues. The $4.8 million dollars imposed on Branchburg is a tuition payment for all students pursuant to a contractual agreement.

powers of the Somerville Board based on municipal boundaries which separate two clearly defined voting jurisdictions are not co-extensive. Therefore, the rational basis review was properly applied. 21a.

## ARGUMENT

## THE THIRD CIRCUIT PROPERLY APPLIED THE HOLT CASE

### A. There Is No Conflict Between Holt And Branchburg, As They Both Involved A Recognition That Valid Geography- Based Restrictions On Voting Do Not Offend The Principle Of One Person, One Vote.

Petitioner seeks review of the Court of Appeals Opinion and Order of December 4, 2002, 301 F. 3d 69 (2002), pursuant to 28 U.S.C. Section 1254(l). Under this standard, however, certiorari may be granted where "a United States Court of Appeals is in conflict with prior Supreme Court decisions." First Nat. Bank of Ariz. v. Cities Service Co., 391 U.S. 253 (1968). As the discussion below demonstrates, petitioner has failed to demonstrate that there is any tension between prior Supreme Court precedent. Furthermore, there is no recurring question of exceptional importance pursuant to S.Ct. R.10.

In Holt v. City of Tuscaloosa, 439 U.S. 60 (1978), this Court expressly recognized geographical boundaries limit the application of the one person, one vote principle. The

decision in Holt addressed the constitutionality of an Alabama statute that subjected Holt, an unincorporated community on the outskirts of the city of Tuscaloosa to the city's police jurisdiction. Holt was subjected to Tuscaloosa's police and sanitary regulations and the primary jurisdiction of the Tuscaloosa court, as well as the city's power to license businesses, trades and professions. However, the statute did not entitle Holt residents to vote in Tuscaloosa's elections.

In concluding that the scheme in Holt did not violate the one person, one vote principle, this Court distinguished other cases, including Hadley v. Junior College Dist. of Metropolitan Kansas City, 397 U.S. 50 (1970) on the grounds that those cases involved a denial of the voting franchise "to individuals who were physically residing within the geographic boundaries of the governmental entity concerned." Holt, supra, 439 U.S. at 68. See e.g. Baker v. Car, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964); Evans v. Corman, 398 U.S. 419 (1970); Little Thunder v. South Dakota, 518 F. 2d 1253 (8th Cir. 1975)(all involving a single voting jurisdiction). It is undisputed that the districts involved in the instant suit are two separate voting districts with their own separate governing bodies.

Since the Third Circuit properly determined that "valid geography-based restrictions on voting do not offend the principle of one person, one vote," it properly applied the rational basis test to the send-receive statute at issue in this case to determine its validity. Holt, supra, 439 U.S. 60 (1978). The court below properly applied this test to Branchburg residents who live outside of the boundaries of Somerville, have their own elected school board and voluntarily entered into a contract with Somerville to educate their high school students.

Petitioner contends that the Third Circuit's decision is inconsistent with the case of Holt v. City of Tuscaloosa, 439 U.S. 60, 99 S. Ct 383, 58 L. Ed 292 (1978). Petitioner's bases this argument on dicta in Holt which "seemed to recognize that in a situation in which a governmental body subjects non-residents to important aspects of state powers," strict scrutiny may apply. Petitioners's brief at p. 10. The Court in Holt did recognized that such powers as the power to tax may be subject to strict scrutiny if such the entity was exercising precisely the same governmental powers over residents of the surrounding territory as it does over those within the jurisdiction. Holt, supra, 439 U.S. at 72. The police powers in Holt are even more onerous as those found in this case. Furthermore, Somerville is not exercising the exact same power over the non-residents, who have their own school board and independently provide education to their K-8 students.

The Third Circuit rejected petitioner's contention that Holt is distinguishable because this case concerns education, a critical function. While recognizing that education is an important function of state and local government, the Third Circuit held that the extraterritorial power over education exercised by the Somerville Board is limited. Furthermore, education is not a fundamental right and is no more important or critical than the governmental powers being exercised in Holt -- police powers. In fact, the power exercised over high school students in Branchburg is significantly less onerous than the general police powers exercised in Holt.

The petitioner further contends that the decision in Holt has "spawned uncertainty" in our lower courts and among commentators. Petitioner's Brief at p. 17. The petitioner compares the case of Mixon v. Ohio, 193 F. 3d

389(6th Cir. 1999) to the district court decision below to support contention that there is uncertainty. However, the Third Circuit has clarified any uncertainty by its reversal of the district court in this case. Furthermore, the case of Mixon is entirely consistent with Holt and the Third Circuit decision below.

In Mixon v. Ohio, 193 F. 3d 389 (6th Cir. 1999). In Mixon, the issue of whether the one person, one vote principle applies to citizens outside of a jurisdiction was squarely addressed. In Mixon, citizens of the Cleveland School District challenged the constitutionality of an Ohio state statute which allowed the Mayor of Cleveland to appoint a new school board for the Cleveland School District. The plaintiff argued that the statute unconstitutionally caused voter disenfranchisement for residents in the Cleveland Park School District living in other parts of the city, because these residents did not vote for the mayor. The court, in finding no violation of the one person, one vote doctrine reasoned that "residence is a key element in determining whether legislation violates the one person, one vote doctrine." Mixon, supra, 193 F. 3d at 304. The Mixon court relied upon, and is entirely consistent with Holt. Likewise, the law review articles relied upon by petitioner do not suggest there is any conflict between Holt and other authorities.

Petitioner has relied upon dicta is several Supreme Court cases to support contention that strict scrutiny should apply to the treatment of one person, one vote in the context of education. See petitioner's brief at p. 11. Notwithstanding that all this support is dicta, the cases are not applicable to the instant case. The Third Circuit's decision is entirely consistent with Ball v. James, 451 U.S. 355 (1981) and Evans v. Cornman, 398 U.S. 419(1970). Although Ball recognized cases where strict scrutiny would

apply, this Court in Ball held that the one person, one vote principle was not offended by a restriction on voting in an election for director of an agricultural improvement and power district. Evans, supra, 389 U.S. at 372. This Court in Ball reasoned that the assessment did not create such general government authority as to involve the strict scrutiny standard. In Evans, this Court invoked the doctrine to protect the total denial of the right to vote to persons actually residing within the single jurisdiction. Again, both of the foregoing cases are entirely consist with this Court's holding in Holt and the decision of the Third Circuit Court of a Appeals below.

Under the rational relationship test, courts apply "a very deferential standard, under which a law will be sustained ... even if the law seems unwise or works to the disadvantage to a particular group, or if the rational for it seems tenuous." Romer v. Evans, 517 U.S. 620, 632 (1996). It is well settled that under this standard, states enjoy significant latitude in the design of local governments. English, supra, 301 F. 3d at 82.

The court in English specifically recognized that the complexity of financing and management of a statewide public school system mandates that "there will be more than one constitutionally permissible method of serving them within the limits of rationality." English, supra, 301 F. 3d at 82.(quoting Jefferson v. Hackney, 406 U.S. 535, 546-47 (1972)). However, the court below also noted that:

> the mere fact that the representation scheme might have been crafted with more precision...does not mean the current system is irrational, for this Court does not sit to determine whether [New Jersey] has chosen

> the soundest or most practical form of internal government possible.

English, supra, 301 F. 3d at 81.

In the instant case, the Third Circuit followed its decision in English wherein it found that, indeed, New Jersey has legitimate reasons for limiting the representation of a sending district in the receiving district's board's decision. English, supra, 301 F. 3d at 80. In following English, the court in Branchburg found that "the possibility of severance does not counsel a different result than English...." The court reasoned that in Holt, Tuscaloosa exerted its police and sanitary regulations and business licensing requirements over Holt, a small town located beyond Tuscaloosa's city limits... and there was no indication that Tuscaloosa's powers were limited in time or that Holt could take action to escape from Tuscaloosa's extraterritorial powers. Holt, 439 U.S. at 61-61. However, despite the seemingly permanent nature of Holt's situation, the Supreme Court held that it did not violate the one person, one vote principle of the Fourteenth Amendment. Id. at 68-70. Thus, even assuming the Branchburg situation may be permanent, which is still speculative in light of the fact that the last time severance was sought was 23 years ago, the general makeup of the populations may have changed since then and the Administrators of state government, including the Commissioner and the State Board of Education have since changed, there is no basis for applying the strict scrutiny standard to these facts.

As there is no tension or conflict between the cases of Branchburg and Holt, there is no basis to grant certiorari in this case. The Third Circuit Court of Appeals properly applied the case of Holt, to the facts in English and

Branchburg, which involved a single voting district. The Third Circuit held that the case of Holt was controlling, which involved a decision of this Court wherein the geographic limits on the one person, one vote principle was expressly adopted. The well reasoned opinion of the Third Circuit Court of Appeals below should not be disturbed.

B. There Is No Recurring Question Of Exceptional Importance In This Case.

Petitioner contends that certiorari is warranted because the Third Circuit's decision in this case will have "substantial practical and legal implications." Petitioner's Brief at p. 13. However, petitioner fails to demonstrate how the limited situation presented in Branchburg could have implications in any other district or in any other state. The petitioner predicates its argument on the fact that there are 215 send-receive relationships in New Jersey. The petitioner fails to provide any other data regarding the high school populations of any of these districts, or whether any of these districts have ever sought to sever the relationships.

The petitioner contends that this is exceptionally important because receiving districts efforts to amend the statute or extricate themselves from the relationship have failed. Petitioner's brief at p. 14. a petition for severance over twenty years ago. As stated previously, the populations of the two geographic jurisdictions may have changed and there is different Commissioner of Education and State Board of Education which would make a determination. We also have no idea what would take place during any appellate review. The petitioner also mistates the facts of English and states that "other sending districts have therefore sought to terminate their send-receive relationships in litigation." Petitioners brief at p. 14. The sending district school in English never sought to sever its relationship, it merely sought to increase representation on the receiving district's board of educations. This effort was unsuccessful. See English v. Board of Educ. of Boonton, 301 F. 3d. 69 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 852 (2003).

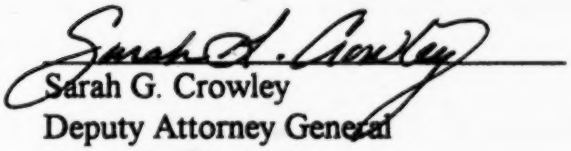
The remainder of the petitioner's argument on this point focuses not on the recurrence of such an issue, but rather repeats an earlier argument regarding the importance of education. However, the Third Circuit adequately addressed this issue its their decision finding that extraterritorial power over education exercised by Somerville is no more important or critical than the governmental powers being exercised in Holt. Thus, the decision below is not in conflict with any other Circuit or with this Court's opinions addressing one person one, one vote principle. Accordingly, there is no recurring question of exceptional importance and certiorari must be denied.

## CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

EDWARD M. NEAFSEY
ACTING ATTORNEY GENERAL
OF NEW JERSEY

By: 
Sarah G. Crowley
Deputy Attorney General
Counsel of Record

Supreme Court, U.S.
FILED
APR 7 2003
CLERK

No. 02-1302

IN THE

# Supreme Court of the United States

BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG,

*Petitioner,*

*v.*

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE; VITO A. GAGLIARDI; DAVID LIVINGSTON,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENT BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE

MICHAEL J. ROGERS
McDONALD & ROGERS, LLC
181 West High Street
Somerville, NJ 08876
908-722-4100

*Counsel for Respondent Board of Education of the Borough of Somerville*

180119

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## QUESTION PRESENTED

Whether the "one person, one vote" principle of the Fourteenth Amendment applies to a state law that grants a minority vote to a school district that sends only its high school students to another school district across municipal electoral boundaries when the sending district has a majority of students at the high school.

## TABLE OF CONTENTS


| | *Page* |
|---|---|
| Question Presented | i |
| Table of Contents | ii |
| Table of Cited Authorities | iii |
| Statement of the Case | 1 |
| Introduction | 1 |
| The New Jersey Send-Receive Statutory Scheme | 3 |
| The History of the Branchburg and Somerville Send-Receive Relationship | 6 |
| Reasons for Denying the Petition | 8 |
| I. There Is No Conflict Among The Circuit Courts Of Appeal Regarding The Application Of *Holt* | 9 |
| II. The New Jersey Representation Statute Is Constitutional Under A Rational Basis Test. | 16 |
| Misstatements of Law and Fact in the Petition | 19 |
| Conclusion | 20 |

## TABLE OF CITED AUTHORITIES

*Page*

**Cases**

*Abbott v. Burke*,
119 N.J. 287, 575 A.2d 359 (Sup. Ct. 1990) .... 17

*Avery v. Midland County*,
390 U.S. 474 (1968) ..... 18

*Board of Education of the Borough of Englewood Cliffs v. Board of Education of the City of Englewood*,
257 N.J. Super. 413, 604 A.2d 914 (N.J. Super., App. Div. 1992), *aff'd* 132 N.J. 326, 625 A.2d 483 (Sup. Ct. 1993), *cert. denied*, 510 U.S. 991 (1993) ..... 4, 6, 7

*Board of Education of the Township of Branchburg v. Board of Education of the Borough of Somerville*,
173 N.J. Super. 268, 414 A.2d 269 (N.J. Super., App. Div. 1980) ..... 6, 7, 8

*Board of Education of the Township of Branchburg v. Livingston*,
312 F.3d 614 (3d Cir. 2002) ..... 2

*Borough of Sea Bright v. New Jersey Department of Education*,
242 N.J. Super. 225, 576 A.2d 331 (N.J. Super., App. Div.) 7 N.J. 320, 604 A.2d 596 (Sup. Ct. 1990) ..... 4, 6

*Cited Authorities*

*Page*

*Duncan v. Coffee County*, 69 F.3d 88 (6th Cir. 1995) ..... 14

*English v. Board of Education of Boonton*, 161 F. Supp. 2d 344 (D.N.J.), *reversed* 301 F.3d 69 (3d Cir. 2003), *cert. denied*, 123 S. Ct. 853 (2003) ..... *passim*

*Evans v. Cornman*, 398 U.S. 419 (1970) ..... 14, 15

*Hadley v. Junior College District*, 397 U.S. 50 (1970) ..... 9

*Hawkins v. Johanns*, 88 F. Supp. 2d 1027 (D. Neb. 2000) ..... 13

*Holt v. City of Tuscaloosa*, 439 U.S. 60 (1978) ..... *passim*

*Jefferson v. Hackney*, 406 U.S. 535 (1972) ..... 18

*Jenkins v. Township of Morris School District*, 58 N.J. 483, 279 A.2d 619 (Sup. Ct. 1971) ..... 17

*Kramer v. Union Free School District No. 15*, 396 U.S. 621 (1960) ..... 9, 12-13

*Little Thunder v. South Dakota*, 518 F.2d 1253 (8th Cir. 1975) ..... 14

*Cited Authorities*

*Page*

*Mixon v. Ohio*,
193 F.3d 389 6th Cir. 1999) ..... *passim*

*Romer v. Evans*,
517 U.S. 620 (1996) ..... 17

*Sailors v. Board of Education*,
387 U.S. 105 (1967) ..... 18

*San Antonio Independent School District v. Rodriguez*,
411 U.S. 1 (1973) ..... 18

*Township of Marlboro v. Board of Education of Freehold Regional High School*,
992 F. Supp. 756 (D.N.J. 1998) ..... 3

**United States Constitution:**

Fourteenth Amendment ..... i

**State Statutes**

N.J. Stat. Ann. § 18A:4-10 ..... 16

N.J. Stat. Ann. § 18A:4-22 ..... 17

N.J. Stat. Ann. § 18A:4-23 ..... 17

N.J. Stat. Ann. § 18A:4-24 ..... 17

*Cited Authorities*

*Page*

N.J. Stat. Ann. § 18A:13-2b ..... 3

N.J. Stat. Ann. § 18A:13-3 ..... 3

N.J. Stat. Ann. § 18A:13-48 ..... 3

N.J. Stat. Ann. § 18A:38-8.1 .....2, 4, 5

N.J. Stat. Ann. § 18A:38-8.2 .....2, 4, 5

N.J. Stat. Ann. § 18A:38-13 .....5, 6, 18, 19

N.J. Stat. Ann. § 18A:38-19 ..... 4

**State Constitutional Provisions**

N.J. Const. Art. VIII, § IV, ¶ 1 ..... 3, 16

## STATEMENT OF THE CASE

### Introduction

In 1956, rather than build its own high school, Petitioner Board of Education of the Township of Branchburg ("Branchburg") chose to educate its high school students by sending them to Respondent Board of Education of the Borough of Somerville ("Somerville"). Branchburg pays tuition to Somerville for this service. The relationship is contractual and is sanctioned and governed by New Jersey state law. It is termed a "send-receive" relationship under New Jersey state education law.

Branchburg and Somerville are separate and independent boards of education, and operate separate and independent school districts. Each exists by virtue of comprehensive New Jersey state enabling legislation. Each board of education has the statutory responsibility to educate all eligible school age children that reside within its respective geographic boundaries. Qualified voters who reside within each separate municipality elect the members of each separate board of education.

Correspondingly, the Township of Branchburg and the Borough of Somerville are separate and independent municipal corporations with their own elected governments that enjoy general governmental and police powers, including property taxation, over all residents within their separate municipal boundaries. Qualified voters that live within each municipality elect their respective municipal officials.

The sole governmental link between Branchburg and Somerville is the contractual send-receive relationship for the education of Branchburg's high school students. Under the New Jersey send-receive statutory scheme, Branchburg is entitled to designate one additional representative to sit on Somerville's nine member board of education and vote on high school and certain district wide issues. This is the "representation statute." N.J. Stat. Ann. §§ 18A:38-8.1, 18A:38-8.2. Branchburg students comprise 53% of the total high school enrollment.

Branchburg sued in federal district court for proportional representation on the Somerville board. The district court held the representation statute unconstitutional as applied because Branchburg has a majority of students at the Somerville high school, but only ten percent of the vote. The district court's remedy, though, increased Branchburg's membership on Somerville's board from just one to six. Branchburg, consequently, was granted forty percent of the total vote by the district court. The Third Circuit reversed. *Board of Education of the Township of Branchburg v. Livingston*, 312 F.3d 614 (3d Cir. 2002); App. 1a.

A different Third Circuit panel reached the same conclusion in a separate but "nearly identical" case interpreting New Jersey's send-receive statute. *English v. Board of Education of Boonton*, 301 F.3d 69 (3d Cir. 2002); *see* App. 18a. The district court in *English* granted petitioner a precise proportional voting majority. *See* 161 F. Supp. 2d 344, 347-348 (D.N.J. 2001). The Third Circuit reversed. This Court denied *certiorari*. 123 S. Ct. 853 (2003).

**The New Jersey Send-Receive Statutory Scheme**

In New Jersey, a school district may choose to educate its children in one of three ways: (1) build, maintain and operate its own school system in whole or in part; (2) form a regional school district with another school district or districts in whole or in part; or (3) enter into a send-receive relationship with another school district in whole or in part. This statutory scheme provides maximum flexibility to local school districts in devising the best methods to educate their children, subject to New Jersey's state constitutional mandate for its legislature to provide a "thorough and efficient system of free public education." N.J. Const. Art. VIII, § IV, ¶ 1.

For example, a school district may elect to own and operate its own grammar schools while choosing to send its high school students on a tuition basis to another school district. This is Branchburg's choice.

A school district could also form a limited purpose or an all purpose regional school district with others. A limited purpose school district could comprise elementary schools, junior high schools, vocational schools, or other particular educational services or facilities. N.J. Stat. Ann. § 18A:13-2b. A regional school district is a separate and independent municipal corporation under New Jersey state law. When two or more school districts form a regional school district, a new governmental entity arises. *See* N.J. Stat. Ann. §§ 18A:13-3, 18A:13-48; *Township of Marlboro v. Board of Education of the Freehold Regional High School*, 992 F. Supp. 756 (D.N.J. 1998).

This is to be distinguished from a send-receive relationship where two separate governmental entities are bound together in a contractual relationship authorized and governed by state law. *See Board of Education of the Borough of Englewood Cliffs v. Board of Education of the City of Englewood*, 257 N.J. Super. 413, 475, 604 A.2d 914, 948 (N.J. Super., App. Div. 1992), *aff'd*, 132 N.J. 326, 625 A.2d 483 (Sup. Ct. 1993), *cert. denied*, 510 U.S. 991 (1993); *Borough of Sea Bright v. New Jersey Department of Education*, 242 N.J. Super. 225, 232-233, 576 A.2d 331, 335 (N.J. Super., App. Div.), *cert. denied*, 127 N.J. 320, 604 A.2d 596 (Sup. Ct. 1990). The sending district pays tuition to the receiving district for the "actual cost" of the students enrolled. N.J. Stat. Ann. § 18A:38-19.

In 1995, the New Jersey legislature enacted laws to grant certain sending districts a voice on the receiving district's board of education. N.J. Stat. Ann. §§ 18A:38-8.1 and 18A:38-8.2. Prior to the adoption of the representation statute in 1995, a sending district had no voice on the receiving district's board of education, regardless of its student body percentage.

The power to designate a representative to sit on a receiving district's board of education is triggered if the sending district's pupils comprise at least ten percent of the total enrollment of the pupils in the grades of the receiving district in which the pupils of the sending district will be enrolled. N.J. Stat. Ann. § 18A:38-8.2a (2). The statute curtails the representative's voting rights to matters that concern the sending district's pupils. N.J. Stat. Ann. § 18A:38-8.1a to d.

The sending district's representative is not directly elected by either district's voters to serve in that capacity. Rather, the sending district's elected board of education annually designates which of its board members shall sit as the representative on the receiving district's board. N.J. Stat. Ann. §§ 18A:38-8.1; 18A:38-8.2d. There is no direct electoral representation.

A send-receive contractual relationship may be terminated by either party upon application to and approval by the New Jersey state commissioner of education.

> Prior to submitting an application the district seeking to sever the relationship shall prepare and submit a feasibility study, considering the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by pupils in each of the districts, and the effect on the racial composition of the pupil population of each of the districts. The commissioner shall make equitable determinations based upon consideration of all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts. The commissioner shall grant the requested change in designation or allocation if no substantial negative impact will result therefrom.

N.J. Stat. Ann. § 18A:38-13.

The send-receive relationship is described as a contract between two school districts for educational services to be provided in exchange for a fixed tuition payment. "Unlike an ordinary contract, however, termination of a sending-receiving relationship is subject, not just to the desires of the parties, but also to the approval of the Commissioner of Education." *Englewood Cliffs*, *supra*, 257 N.J. Super. at 457-458, 608 A.2d at 939. "[S]ending and receiving districts remain distinct political entities which enter contracts for educational services under the supervision of the Commissioner of Education." *Sea Bright*, *supra*, 242 N.J. Super. at 233, 576 A.2d at 335.

**The History of the Branchburg and Somerville Send-Receive Relationship**

In 1975, Branchburg unsuccessfully sought to sever its contractual send-receive relationship with Somerville. *Board of Education of the Township of Branchburg v. Board of Education of the Borough of Somerville*, 173 N.J. Super. 268, 270, 414 A.2d 259, 260 (N.J. Super., App. Div. 1980); *see* App. 13a-14a. According to the state court decision, Branchburg and Somerville formalized their send-receive agreement in writing in 1956. Although the agreement expired in 1965, the relationship continued without a formal written renewal agreement pursuant to the enabling send-receive statute. *Id.* at 270-271, 414 A.2d at 260; N.J. Stat. Ann. § 18A:38-13. The state appellate court concluded that "a severance would . . . break up a well-run high school and produce two high schools of lesser quality. *Ibid.*, 173 N.J. Super. at 276, 414 A.2d at 263.

By the time the severance litigation concluded in 1980, Branchburg argued that regionalization was not a viable solution. *Id.* The court also noted that in 1972 Branchburg voters defeated a bonding proposal to construct a new high school. *Id.* at 271, 414 A.2d at 260. Accordingly, Branchburg commenced litigation to sever without any assurance that its voters would approve construction of a new high school.

New Jersey's commissioner of education characterized Branchburg's lack of direct representation on the Somerville board as a matter for "legislative review and change, not administrative action." *Id.* at 273, 414 A.2d at 261. At the time, Branchburg had no voice or vote on the Somerville board.

The severance statute under review at the time Branchburg filed its previous action is substantively different than that in existence today. The statute previously provided that a send-receive relationship could be severed upon a showing of "good and sufficient reason." Applying this standard, the commissioner of education would permit severance only if the benefit to the petitioning district outweighed the claims of the defending district. In 1986, the state legislature adopted a "no substantial negative impact" standard. The commissioner of education must now weigh and balance a number of factors, including financial, racial composition and educational impact. *See generally Englewood Cliffs, supra*, 257 N.J. Super. at 459-60, 608 A.2d at 939-41.

Branchburg never again formally sought severance from Somerville under the statute, even under the revised statutory standard.

In 1996, Branchburg and Somerville explored the feasibility and desirability of creating an all purpose K-12 regional school district. The experts retained by each side advised against the proposal. In 1999, in response to an order of the district court in this case, Branchburg explored the creation of a limited purpose 9-12 (high school) regional school district. The study, commissioned by Branchburg, recommended against the proposal because of the adverse financial impact to Somerville. *See* App. 14a-15a.

Dissatisfied with the representation statute, Branchburg seeks a judicial rather than political solution. Elected local government units in New Jersey change each year with new personalities, priorities, positions, populations and goals. Branchburg may or may not feel satisfied for the time being with sending its high school students to Somerville. It may wish to sever the relationship in the future. The send-receive statute provides Branchburg the right to apply to the commissioner of education to do so. Somerville too may seek severance as it once intended to do in 1970. *Ibid.*, 173 N.J. Super. at 271, 414 A.2d at 260.

## REASONS FOR DENYING THE PETITION

The Court's holding in *Holt v. City of Tuscaloosa*, 439 U.S. 60 (1978), is dispositive of petitioner's constitutional claims. *Holt* recognizes that a state may restrict the voting franchise to the residents of a local governmental unit. Under the facts presented, petitioner does not have the right to vote across geographic lines in another non-contiguous municipality.

Petitioner's reliance on *Hadley v. Junior College District of Metropolitan Kansas City, Missouri*, 397 U.S. 50 (1970), and *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1960), is misplaced. The plaintiffs in *Hadley* were residents and taxpayers of the Kansas City School District, one of eight separate school districts which combined to form the Junior College District of Metropolitan Kansas City. As such, the *Hadley* plaintiffs resided in the junior college district and were eligible to vote for the members of the junior college district board. *Kramer* invalidated a state education statute that limited the right to vote to those who had property interests or children in the school district, to the exclusion of all other residents. The common thread in *Hadley* and *Kramer* is that the aggrieved non-voters were residents of the governmental unit.

In this case, petitioner seeks an unwarranted extension of the "one person, one vote" principle.

## I. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL REGARDING THE APPLICATION OF *HOLT*.

*Holt* refused to extend the "one person, one vote" principle to non-residents of a governmental unit. As in *Holt*, the cases relied on by petitioner here "in each case denied the franchise to individuals who were physically resident within the geographic boundaries of the governmental entity concerned." 439 U.S. at 68.

> No decision of this Court has extended the "one man, one vote" principle to individuals residing beyond the geographic confines of the governmental entity concerned, be it the State or

> its political subdivisions. On the contrary, our cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders.

*Id.* at 68-69.

Under *Holt*, the one person, one vote principle is implicated only when the voting district is "exercising precisely the same governmental powers over [non-residents] as it does over [residents]." *Id.* at 72 n.8. This is so even if the voting district's actions have a significant, heavy or dramatic impact on non-residents. *Id.* at 69-70. Somerville's exercise of authority over Branchburg is quite limited, and does not nearly coincide with its authority over its own residents. *Id.*

The Third Circuit recently decided a virtually identical case challenging New Jersey's representation statute in this send-receive statutory scheme. *English v. Board of Education of Boonton*, 301 F.3d 69 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 852 (2003); *see* App. 18a. These decisions must be read *in para materia*. Petitioner, nonetheless, claims a "crucial" distinction between *Branchburg* and *English*: the Branchburg board of education once attempted to sever the relationship, while the sending district in *English* did not. Pet. at 14-15 n.2; App. 18a. This is a distinction without a difference under *Holt*. As the opinion below stated:

> Our conclusion here that the possibility of severance does not counsel a different result than in *English* is consistent with the holdings in both *Holt* and *Little Thunder. In* Holt, Tuscaloosa

> exerted its police and sanitary regulations and business licensing requirements over Holt, a small town located beyond Tuscaloosa's city limits. 439 U.S. at 61-62. There was no indication that Tuscaloosa's powers were limited in time or that Holt could take action to escape from Tuscaloosa's extraterritorial powers. However, despite the seemingly permanent nature of Holt's situation, the Supreme Court held that it did not violate the one person, one vote principle of the Fourteenth Amendment. *Id.* at 68-70.

App. 23a.

Moreover, like the sending district in *English*, Branchburg retains the statutory right to apply for severance in the future. The fact that Branchburg sought severance over twenty five years ago does not preclude a future request. As mentioned, many years have elapsed and the statutory standard has changed in the interim. Even if, however, Branchburg cannot gain severance now or in the future, "[its] inability to sever the relationship does not affect the limited nature of Somerville's extraterritorial powers." App. 21a. As in *Holt*, the fact that the non-voting district cannot extricate itself from the relationship is not a "deciding factor." App. 23a. Somerville concedes the adhesive nature of a send-receive relationship because only the state commissioner of education can authorize severance after consideration of the statutory factors. This reality does not, however, alter the minimal governmental powers Somerville exercises over Branchburg in the education of its high school students.

The Third Circuit in *English* noted the following factors in addressing the relatively limited extraterritorial impact of the receiving district:

> 1. The receiving district controls only four of thirteen years of a child's education.
>
> 2. The sending district has its own board of education elected by its own residents for the governance of its K-8 affairs.
>
> 3. The sending district does have a voice on the receiving district's board of education.
>
> 4. The sending district does not have the same vested interest in the long-term affairs of the receiving district (e.g., capital improvements and employee pension plans).
>
> 5. Because the sending district's representative may vote on certain receiving district wide matters, it makes sense to preserve control in the receiving district.

301 F.3d at 80, 82. The same factors apply here. App. 20a-21a.

*Mixon v. Ohio*, 193 F.3d 389 (6th Cir. 1999), upheld an Ohio remedial education state statute that permitted the Mayor of Cleveland to appoint board of education members who exercised extraterritorial authority over non-residents who did not vote in Cleveland elections. As did the Third Circuit in *English*, the court in *Mixon* relied on *Holt* and distinguished petitioners' reliance on *Kramer v. Union Free*

*School District No. 15*, 395 U.S. 621 (1969). *Mixon*, 193 F.3d at 405-406. The *Mixon* court stated:

> Residency is the key element in determining whether legislation violates the one-person, one-vote doctrine.
>
> . . . .
>
> *Holt* . . . illustrates that non-residents do not necessarily have the right to vote in a city election simply because the city has some limited authority over the non-residents.
>
> . . . .
>
> *Kramer* [on the other hand] refers to "residents" within the school district who lack the right to vote.

*Id.* at 405. *See also Hawkins v. Johanns*, 88 F. Supp. 2d 1027, 1043, 1046-47 (D. Neb. 2000).

Petitioner states that this Court should resolve the "tension" between *Holt* and the decision below. Petitioner asserts that the Third Circuit ignored that aspect of *Holt* that mentioned that strict judicial scrutiny should apply to voting cases where non-residents are subject to "important aspects of state powers." Pet. at 9-10; *see* App. 20a; *see Holt*, *supra*, 439 U.S. at 72 n.8. Petitioner implies that the Third Circuit somehow "overlooked" its argument that the facts of this case warrant the conclusion that Somerville exercises "important aspects of state powers" over Branchburg. Pet. 10-11. This contention mischaracterizes the findings and holding below, and that in *English*, *supra*. Petitioner creates

the impression that the Third Circuit disregarded this aspect of *Holt*, and that the Sixth Circuit traversed beyond that contemplated by *Holt*. Pet. at *id.*, 10 n.2. *See Mixon*, *supra* 193 F.3d at 405; *Duncan v. Coffee County*, 69 F.3d 88 (6th Cir. 1995).

The holding below and the decision in *English* are straightforward applications of *Holt*. As did the Third Circuit, *Holt* readily distinguished *Little Thunder v. South Dakota*, 518 F.2d 1253 (8th Cir. 1975), and *Evans v. Cornman*, 398 U.S. 419 (1970). 439 U.S. at 72 n.8. In *Little Thunder*, the court struck down on equal protection grounds a state statute that denied the right to vote to residents of unincorporated counties annexed to incorporated counties. An incorporated county exercised the same governmental powers over the residents of the unincorporated county as it did on its own residents. Petitioner seems to concede that *Little Thunder* does not apply here because Somerville exercises control only over Branchburg's high school students, and nothing else. Pet. 9.

In *Evans*, residents of a federal enclave were denied the right to vote in Maryland elections. These residents were directly affected by Maryland's criminal laws, spending and taxation, unemployment and workmen's compensation, and automobile licensing and registration requirements. Additionally, they were subject to the jurisdiction of Maryland's courts, and their children were enrolled in the Maryland public schools. *Id.* at 424. Justice Marshall stated:

> In nearly every election, federal, state and local, for offices from the Presidency to the school board, and on the entire variety of other ballot

> propositions, appellees have a stake equal to that of other Maryland residents. As the District Court concluded, they are entitled under the Fourteenth Amendment to protect that stake by exercising the equal right to vote.

*Id.* at 426. Thus, in *Evans*, the non-voters were deprived completely of the voting franchise "in important aspects of state powers" while actually residing in the voting district. Petitioner in this case selects this phrase from *Holt* and *Evans* and attempts to associate this language with the vastly different facts present here. Somerville hardly wields comparable influence over Branchburg as did Maryland over the residents of the NIH federal enclave at issue in *Evans*.

Moreover, the Third Circuit in *English* explained at length why New Jersey's send-receive statute is distinguishable from the education cases relied on by petitioner.

> While we do not gainsay that education is a governmental function of the utmost importance, *see Brown v. Bd. Of Educ.*, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed.2d 873 (1954) (noting that "education is perhaps the most important government function of state and local governments"), we doubt the viability of that distinction in this context. At all events, we think that the extraterritorial power over education exercised by the [receiving district] is itself "limited" for the [following] reasons: the [receiving district] controls only four of the thirteen years of a [sending district] child's education, and the [sending district] possesses its own school board elected by [its] residents for the governance of its K-8 affairs.

> Moreover, [sending district] residents are not without any voice in the governance of [the high school], for state law . . . entitles the [sending district] to appoint a representative to the [receiving district's] board. That person may speak at Board meetings to convey [the sending district's] point of view. He or she also has a vote on matters that primarily affect the high school.

*English*, *supra*, 301 F.3d at 79-80.

## II. THE NEW JERSEY REPRESENTATION STATUTE IS CONSTITUTIONAL UNDER A RATIONAL BASIS TEST.

Petitioner urges that strict scrutiny apply to the representation statute. Pet. 13. *Holt*, however, determined the standard to be "whether . . . the [state statute] bears some rational relationship to a legitimate state purpose." *Holt*, *supra*, 439 U.S. at 70. A statute is not subject to "strict scrutiny simply because it relates to education." *Mixon*, *supra*, 193 F.3d at 403. States are afforded "extraordinarily wide latitude" in allocating state legislative power to municipal corporations and experimenting with local government authority. *Holt*, 439 U.S. at 71.

The design, management and implementation of New Jersey's comprehensive statewide system of public education is vested in the state legislature, which is constitutionally obligated to provide a "thorough and efficient system of free public schools." N.J. Const. Art. VIII, § IV, ¶ 1. The state board of education supervises the education system with rule making authority while the state commissioner of education is its chief executive officer. N.J. Stat. Ann. §§ 18A:4-10;

18A:4-22 to -24; *see generally Jenkins v. Township of Morris School District*, 58 N.J. 483, 494, 279 A.2d 619, 625 (Sup. Ct. 1971). New Jersey's experiment with education is continuously evaluated and modified by the state legislature. The state judiciary insures that all legislation and implementing regulations comport with the "thorough and efficient" constitutional mandate. *See Abbott v. Burke*, 119 N.J. 287, 575 A.2d 359 (Sup. Ct. 1990).

For years, a sending district had no vote on a receiving district's board of education. This changed in 1995, when the representation statute was adopted. The legislature responded positively to complaints that a sending district had no voice in the education of its own students. In fact, a bill for proportional representation like that sought by Branchburg here was presented to the state legislature in 1994 (S-151), and was rejected in favor of the existing representation statute.

In upholding the constitutionality of the representation statute, the Third Circuit, in *English*, *supra*, 301 F.3d at 82, stated:

> "Rational relationship" review is, of course, a very deferential standard, under which "a law will be sustained . . . even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer v. Evans*, 517 U.S. 620, 632, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). So long as strict scrutiny is not implicated, states enjoy significant latitude in the design of local governments, for "the Constitution and this Court are not roadblocks in the path of innovation, experiment, and development among units of local governments."

> *Avery* [*v. Midland County*], 390 U.S. [474,] at 485 [(1968)]. Indeed, this deference to state legislative judgment is particularly appropriate in the realm of educational policy, where, as noted, "[t]he very complexity of the problems of financing and managing a statewide public school system suggests that 'there will be more than one constitutionally permissible method of solving them' and that, within the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect." [*San Antonio Independent School District v.*] *Rodriguez*, 411 U.S. [1,] at 42, [93 S.Ct. 1278, 36 L.Ed.2d 16 (1973)], (quoting *Jefferson v. Hackney*, 406 U.S. 535, 546-547, 92 S.Ct. 1724, 32 L.Ed.2d 285 (1972)).

*See* App. 19a.

All sending districts in New Jersey, including Branchburg, and regardless of the percentage of students involved, retain the statutory right to seek severance, subject to the approval of the commissioner of education. N.J. Stat. Ann. § 18A:38-13. At the present time, Somerville does not think it prudent or wise for Branchburg to separate.

The judiciary is not a "super legislature" imposing its will on the elected representatives of the people. "State legislatures need the freedom to experiment with different techniques to advance public education and this need to experiment alone satisfies the rational basis test." *Mixon*, *supra*, 193 F.3d at 403. *See Sailors v. Board of Education*, 387 U.S. 105, 110-11 (1967). New Jersey's experiment with education continues and "nothing in the Equal Protection Clause of the Fourteenth Amendment requires that it try something new." *Holt*, *supra*, 429 U.S. at 75.

## MISSTATEMENTS OF LAW AND FACT IN THE PETITION

1. In its "Question Presented," Petitioner inaccurately states that Branchburg parents, and others similarly situated, are *required by state law* to send their children to a neighboring school district. Pet. i; *see* Pet. 1, 14. The send-receive statute, N.J. Stat. Ann. § 18A:38-13, in fact permits withdrawal by a sending district, subject to the approval of the commissioner of education, if the statutory criteria are satisfied.

The opinion below assumed Branchburg could not extricate itself from Somerville for purposes of the constitutional analysis. App. 19a-23a.

2. There is no ambiguity in *Holt* about the circumstances when non-residents of one geographic unit may vote in the elections of another geographic unit. Nor is there any "tension" between *Holt* and the decision below. Pet. 1, 8.

3. Branchburg contends that its previous severance attempt distinguishes its situation from that in *English*. Pet. 14 n.2. The fact that Branchburg sought severance over twenty-five years ago is of no constitutional significance when applying the principles of *Holt*. App. 19a.

## CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition be denied.

Respectfully submitted,

MICHAEL J. ROGERS
McDONALD & ROGERS, LLC
181 West High Street
Somerville, NJ 08876
908-722-4100

*Counsel for Respondent*
*Board of Education of the*
*Borough of Somerville*

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No. 02-1302

IN THE

# Supreme Court of the United States

BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG,

*Petitioner,*

*v.*

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE; VITO A. GAGLIARDI; DAVID LIVINGSTON,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF OF AMICI CURIAE ALLAMUCHY TOWNSHIP BOARD OF EDUCATION; BOROUGH OF ALPHA BOARD OF EDUCATION; ANDOVER REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION; BOONTON TOWNSHIP BOARD OF EDUCATION; BOROUGH OF BARRINGTON BOARD OF EDUCATION; BOROUGH OF BLOOMINGDALE BOARD OF EDUCATION; CORBIN CITY BOARD OF EDUCATION; FOLSOM BOARD OF EDUCATION; GREAT MEADOWS REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION; GREEN TOWNSHIP SCHOOL DISTRICT BOARD OF EDUCATION; GREEN BROOK TOWNSHIP SCHOOL DISTRICT BOARD OF EDUCATION; HOPE TOWNSHIP BOARD OF EDUCATION; LAUREL SPRINGS SCHOOL DISTRICT BOARD OF EDUCATION; LAVALLETTE BOARD OF EDUCATION; LITTLE FERRY BOARD OF EDUCATION; MERCHANTVILLE BOARD OF EDUCATION; WEYMOUTH TOWNSHIP BOARD OF EDUCATION IN SUPPORT OF PETITIONER

RICHARD BRIFFAULT
COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027
(212) 854-2638

JOHN J. GIBBONS
KEVIN MCNULTY
TIMOTHY S. SUSANIN*
GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE
One Riverfront Plaza
Newark, NJ 07102-5496
(973) 596-4500

* *Counsel of Record*

*Counsel for Amici Curiae*

22 pp

## QUESTION PRESENTED

When state law links together two school districts, so that the children of one district attend high school in another district, does the one person, one vote doctrine of the Equal Protection Clause of the Fourteenth Amendment require that voters of the sending district receive fair representation on the elected school board of the receiving district with respect to matters concerning the high school that the children from the sending district attend?

## TABLE OF CONTENTS

*Page*

Question Presented ..... i

Table of Contents ..... ii

Table of Cited Authorities ..... iii

Interest of Amici Curiae ..... 2

Reasons for Granting the Writ ..... 4

I. This Case Presents the Court With an Important Opportunity to Clarify the Application of Constitutional Standards to the State Denial of Voting Rights Under Interlocal Agreements ..... 4

II. By Rejecting the Claim of Sending District Parents to Fair Representation in the Governance of the High School that Their Children Attend, the Decision of the Court of Appeals is in Tension with Decisions of this Court Requiring Strict Judicial Scrutiny of State Laws that Deny Equal Voting Rights in School Board Elections ..... 9

Conclusion ..... 16

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Avery v. Midland County*, 390 U.S. 474 (1968) .... 6

*Baker v. Regional High School Dist. No. 5*, 520 F.2d 799 (2d Cir. 1975) ..... 15

*Ball v. James*, 451 U.S. 355 (1981) ..... 10

*Barnes v. Board of Directors, Mt. Anthony Union High School District (No. 14)*, 418 F. Supp. 845 (D. Vt. 1975) ..... 15

*Board of Education of Township of Branchburg v. Board of Education of Borough of Somerville*, 173 N.J. Super. 268, 414 A.2d 259 (N.J. App. Div. 1980) ..... 7

*Board of Education of the Township of Branchburg v. Livingston*, 312 F.3d 614 (3d Cir. 2002) ..... 11, 13

*Board of Estimate v. Morris*, 489 U.S. 688 (1989) .. 5, 6, 13

*Cunningham v. Municipality of Metropolitan Seattle*, 751 F. Supp. 885 (W.D. Wash. 1990) ..... 5

*English v. Board of Education of the Town of Boonton*, 135 F. Supp. 2d 588 (D.N.J. 2001), *rev'd*, 301 F.3d 69 (3d Cir. 2002) ..... 7, 11

*Cited Authorities*

*Page*

*Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50 (1970) ..... 9, 14

*Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978) ..... 5, 11, 12

*Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969) ..... 6, 9, 10

*Little Thunder v. South Dakota*, 518 F.2d 1253 (8th Cir. 1975) ..... 12

*Milliken v. Bradley*, 418 U.S. 717 (1974) ..... 10

*Sailors v. Board of Education*, 387 U.S. 105 (1967) ..... 5

*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) ..... 10

*Township of Franklin v. Board of Education of North Hunterdon Regional High School*, 74 N.J. 345, 378 A.2d 218 (N.J. 1977) ..... 15

*Township of Marlboro v. Board of Education of Freehold Regional High School*, 992 F. Supp. 756 (D.N.J. 1998) ..... 15

*Cited Authorities*

*Page*

**United States Constitution:**

Fourteenth Amendment ..... i, 9

**Statutes and Rules:**

N.J. Stat. Ann. § 18A-38-8.2 (1999) ..... 2, 6

N.J. Stat. Ann. § 18A:38-13 ..... 7

**Other Authorities:**

Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. Rev. 190 (2001) ..... 5

Dale Krane, Platon Riggs, Melvin B. Hill, Jr., *Home Rule in America: A Fifty-State Handbook* (2001) ..... 4

Gary Miller, *Cities by Contract* (1981) ..... 4

Sands & Libonati, *Local Government Law* (2002) ... 4

U.S. Advisory Commission on Intergovernmental Relations, *State Laws Governing Local Government Structure and Administration* (1993) ..... 4

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

**BRIEF OF AMICI CURIAE ALLAMUCHY TOWNSHIP BOARD OF EDUCATION; BOROUGH OF ALPHA BOARD OF EDUCATION; ANDOVER REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION; BOONTON TOWNSHIP BOARD OF EDUCATION; BOROUGH OF BARRINGTON BOARD OF EDUCATION; BOROUGH OF BLOOMINGDALE BOARD OF EDUCATION; CORBIN CITY BOARD OF EDUCATION; FOLSOM BOARD OF EDUCATION; GREAT MEADOWS REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION; GREEN TOWNSHIP SCHOOL DISTRICT BOARD OF EDUCATION; GREEN BROOK TOWNSHIP SCHOOL DISTRICT BOARD OF EDUCATION; HOPE TOWNSHIP BOARD OF EDUCATION; LAUREL SPRINGS SCHOOL DISTRICT BOARD OF EDUCATION; LAVALLETTE BOARD OF EDUCATION; LITTLE FERRY BOARD OF EDUCATION; MERCHANTVILLE BOARD OF EDUCATION; WEYMOUTH TOWNSHIP BOARD OF EDUCATION IN SUPPORT OF PETITIONER**

## INTEREST OF AMICI CURIAE[1]

The amici curiae are seventeen New Jersey school districts that, under New Jersey law, are each paired to another school district in a high school send-receive relationship. Children from the amici districts are sent to high schools in receiving districts, where they receive their ninth through twelfth grade education. These high schools are governed by the elected school boards of the receiving districts. The receiving district school boards have the power, inter alia, to determine the curricular and extracurricular programs of children from the sending districts; to control the appointment, transfer and removal of the teachers and administrators who provide educational services to children from the sending district; to authorize new capital construction to be utilized by the children from the sending districts; and to determine the tuition to be charged the taxpayers of the sending district to cover the costs of educating the children of the sending district. The tuition bill from the receiving district is financed by the property taxes paid by the residents of the sending district.

New Jersey law allows amici one seat on the board of education of their particular receiving district if the residents of the sending district constitute 10% or more of the combined total of the sending and receiving districts. *See N.J. Stat. Ann. § 18A-38-8.2 (1999)*. This tenth member may vote only on matters concerning the high school. In most of the send-receive relationships in which amici are involved,

1. This brief is filed with the written consent of all parties and those consents are being lodged herewith. Counsel for a party did not author this brief in whole or in part. No person or entity other than *Amici*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

however, the residents of the amici districts constitute considerably more than 10% of the combined total of residents of the amicus and its paired receive school district. So, too, the number of high school students from each amicus district is in most cases more than 10% of the combined total of high school students from the amicus district and its paired receive district. In two of the send-receive relationships in which amici participate, children from the amici districts constitute 50% or more of the total student population in the high school amici share with the receiving district. Yet, despite their larger share of the local population and of the high school population, they are still limited by New Jersey law to just one seat out of ten, and one vote out of ten, on the receiving district board when high school matters are addressed.

As a result of New Jersey's law, the voters of the sending district are underrepresented on the boards of education of the receiving districts. The parents and taxpayers of these amici districts are thereby denied fair representation in making educational policy for their high school children and in determining the tax-based cost of the high school education that they are financing. Like petitioner, they have a direct stake in the outcome of this litigation.

## REASONS FOR GRANTING THE WRIT

### I. This Case Presents the Court With an Important Opportunity to Clarify the Application of Constitutional Standards to the State Denial of Voting Rights Under Interlocal Agreements

New Jersey's send-receive arrangement for the provision of high school education is only one of countless thousands of interlocal contracts, joint services agreements, transfers of functions, and other special arrangements for the provision of important local government services. Today nearly all states authorize their local governments to enter into intergovernmental service agreements or to create special districts to provide services to areas both broader and smaller than existing local general purpose local governments. *See, e.g.*, Sands & Libonati, *Local Government Law* §§ 6.01-6.09 (2002); Dale Krane, Platon Riggs, Melvin B. Hill, Jr., *Home Rule in America: A Fifty-State Handbook* 489 (2001); U.S. Advisory Commission on Intergovernmental Relations, *State Laws Governing Local Government Structure and Administration* 9 (1993).

These arrangements promote the flexible provision of services, enable local governments to adapt to changes in population, permit the realization of economies of scale, facilitate the spreading and sharing of costs across multiple localities, and allow small local units to option necessary services from larger governments. The authority to contract for basic services has made it easier for new local governments to form, *see, e.g.*, Gary Miller, *Cities by Contract* (1981), and for older small localities to maintain their independent existence. Interlocal contracts permit the regionalization of services without imposing regional

governments. *See, e.g.*, Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. Rev. 190 (2001). These arrangements have certainly benefitted many of the amici districts. As relatively small districts, many of these districts would have found it financially burdensome to establish and maintain their own high schools. The send-receive arrangement has enabled them to share costs and benefits with other districts. The receive districts also benefit by enabling them to spread the many fixed costs of their high schools over a broader tax base.

Although often beneficial to local residents, interlocal agreements and similar arrangements for the regional pooling of services and costs raise important questions of representation of and accountability to local residents. Residents may lose direct democratic control when services are provided by another government, and the equal representation may be undermined when important services are provided by political bodies that do not abide by the one person, one vote principal. *See, e.g.*, *Cunningham v. Municipality of Metropolitan Seattle*, 751 F. Supp. 885 (W.D. Wash. 1990); *Board of Estimate v. Morris*, 489 U.S. 688 (1989).

This Court has repeatedly affirmed the importance of flexibility and experimentation in local governance. "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions." *Sailors v. Board of Education*, 387 U.S. 105, 110-11 (1967). The states enjoy "extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority upon them." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978).

But experimentation with local government structure remains subject to the Constitution, and when local governments are elected, strict scrutiny of state legislation allocating the franchise and representation on local units is required. *See, e.g., Avery v. Midland County*, 390 U.S. 474, 485-86 (1968); *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969); *Board of Estimate, supra.*

This case provides an important opportunity to clarify the tension between recognition of the value of interlocal agreements and regional innovations in local service delivery and the ongoing importance of protecting the right to vote. The New Jersey high school send-receive relationship differs in one significant way from many interlocal agreements. Although nominally a product of voluntary contract, New Jersey's send-receive arrangements and the role of the sending school districts in basic decision-making concerning their shared high school are strongly determined by state law rather than the consent of the parties.

First, the rule limiting the send district to at most one representative on the board of the receiving district when high school matters are determined is the result of state law, not private negotiation. *See N.J. Stat. Ann. § 18A:38-8.2.* The sending and receiving districts lack any authority to negotiate for greater representation of the sending districts on the receiving district boards.

Second, although the send-receive arrangements begin as a result of a voluntary agreement, they may be forced by the state to continue long after one or the other party has sought to end the arrangement. Under New Jersey law, a send-receive relationship may not be ended, even after the expiration of the original interdistrict contract, without the consent of the state commissioner of education. Prior to

seeking the commissioner's consent, the district desiring to terminate the arrangement must first "prepare and submit a feasibility study, considering the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by the pupils of each of the districts, and the effect on the racial composition of the pupils of each of the districts." *N.J. Stat. Ann. § 18A:38-13.* In reaching a decision, the commissioner must also consider "all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts." *See id.*

Plainly, a sending district has no right to end its relationship with a receiving districts. Indeed, many such relationships continue long past the expiration of the contracts linking the districts. The process of separation is costly and there is no guarantee that a district desiring to terminate will succeed. *See, e.g., Board of Education of Township of Branchburg v. Board of Education of Borough of Somerville*, 173 N.J. Super. 268, 414 A.2d 259 (N.J. App. Div. 1980) (affirming decision of the State Board of Education affirming action of State Commissioner of Education denying Branchburg's request to withdraw from send-receive arrangement with Somerville). Indeed, it appears that due to the financial impact of the loss of the sending district's tuition payments for the receiving district, the state commissioner of education has never allowed a send-receive relationship to be terminated when children from the sending constitute more than 25% of the total send-receive population of the receiving district's high school. *See English v. Board of Education of Town of Boonton*, 135 F. Supp. 2d 588, 592 (D.N.J. 2001), *rev'd*, 301 F.3d 69 (3d Cir. 2002).

Many districts do not even try to terminate send-receive relationships but, instead, accept the fact that they are locked into a virtually permanent relationship with another district.

The state's practice effectively locks in those districts which provide a significant fraction of the children and tuition dollars in receiving district high schools into the send-receive relationship. As a result, the districts with the greatest stake in the governance of the receiving high schools are both the most discriminated against by the combined effect of the state's law limiting representation on receiving district school boards and the state's practice of denying the opportunity to end the relationship.

The undemocratic denial of fair representation to sending districts at issue in this case is, thus, largely the result of state laws and administrative practices rather than the terms of the send-receive agreements negotiated by the school districts.

This case, therefore, provides the Court with the opportunity to clarify that, notwithstanding the considerable leeway states and local governments ought to enjoy to develop flexible and innovative forms of service delivery, constitutional requirements continue to apply to state laws and practices that mandate the denial of voting rights under interlocal agreements.

## II. By Rejecting the Claim of Sending District Parents to Fair Representation in the Governance of the High School that Their Children Attend, the Decision of the Court of Appeals is in Tension with Decisions of this Court Requiring Strict Judicial Scrutiny of State Laws that Deny Equal Voting Rights in School Board Elections

The central fact of this case, not challenged by respondent or denied by the court of appeals, is that the high school operated and maintained by the "receiving district" is the high school in which the children of the "sending district" receive their ninth through twelfth grade educations, and it is also the high school financed by the high-school portion of the property taxes paid by the residents of the send district.

This Court has consistently held that when school boards are locally elected, the highest degree of constitutional protection attaches to the right to vote in school board elections. Statutes denying the franchise to otherwise qualified voters will be subject to "a close and exacting examination" with any exclusion from the franchise "necessary to promote a compelling state interest." *Kramer*, 395 U.S. at 626-27. So, too, the apportionment of votes on the governing body of a school board elected by vote is subject to the strict requirements of the "one person, one vote" doctrine of the Equal Protection Clause of the Fourteenth Amendment. *See Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50 (1970). As Justice Powell once observed in explaining why school board elections are marked by the strongest constitutional protection of the right to vote while most other special district elections do not, "[t]hese cases [*Kramer* and *Hadley*] reflect

the Court's judgment as to the unique importance of education among the functions of modern local government." *Ball v. James*, 451 U.S. 355, 372 n. 1 (1981) (Powell, J., concurring).

School board elections are of constitutional significance because the local democratic control they provide is "essential both to the maintenance of community concern and support for public schools and to the quality of the educational process." *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974). Voting in local school board elections "affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'" *Id.* at 742, quoting *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 50 (1973). Even when adopted by a state legislature that is itself democratically elected and properly apportioned, laws that infringe on the right to vote in school board elections are unconstitutional. *Kramer*, 395 U.S. at 628.

By limiting voters in a sending district to no more than one seat on the board of a receiving district when high school matters are at issue, regardless of how great the sending district's share is of the combined population of the sending and receiving districts, New Jersey's law is inconsistent with this well-established constitutional principle of democratic representation in school board elections. In districts with more than 10% of the combined population, New Jersey effectively denies sending district residents their fair opportunity to participate in high school decision-making and to structure the high school program to fit their local needs.

In sustaining the limited representation of sending district voters the Third Circuit relied on *Holt*, *supra*. *See Board of Education of the Township of Branchburg v. Livingston*, 312 F.3d 614, 621-24 (3d Cir. 2002). *See also English v. Board of Education of the Town of Boonton*, 301 F.3d at 77-82. In *Holt*, this Court upheld an Alabama law enabling certain cities to enjoy limited extraterritorial authority in a police jurisdiction three miles outside the city limits without providing residents of the police jurisdiction a vote in city elections. The Court found that strict judicial scrutiny of laws denying the right to vote in local elections did not apply to the extraterritorial authority at issue in *Holt*.

*Holt* did not rule that all extraterritorial cases were exempt from strict judicial protection of the right to vote. *Holt* clearly indicates the "indirect extraterritorial effects" – even substantial effects – of local government actions on non-residents do not give such nonresidents the right to vote in local elections. 439 U.S. at 69. So, too, *Holt* holds that nonresidents have no right to vote in the elections of a municipality that has a direct but limited authority over those nonresidents. That was the situation in *Holt*. The City of Tuscaloosa could enforce certain police and sanitary regulations and collect from businesses in the police jurisdiction only one-half the license fee chargeable to similar business conducted within the city limits. *See id.* at 61-62.

*Holt*, however, specifically noted that Tuscaloosa's extraterritorial powers did not include the "vital and traditional authorities of cities and towns to levy ad valorem taxes, invoke the power of eminent domain, and zone property for various types of uses." *Id.* at 73 n.8. The Court stressed that the case did not involve "a situation in which a

city has annexed outlying territory in all but name, and is exercising precisely the same governmental powers over residents of surrounding unincorporated territory as it does over those residing within its corporate limits." *See id.* On this point, *Holt* cited *Little Thunder v. South Dakota*, 518 F.2d 1253 (8th Cir. 1975), which held that a South Dakota law enabling the elected officials of an "organized county" to exercise "substantial power over the affairs of individuals" living in an adjacent "unorganized county" without giving "unorganized county" residents the vote in organized county elections was unconstitutional.

The Court's citation to *Little Thunder* suggests that even after *Holt*, when one local government unit wields substantial and direct authority over nonresidents, those nonresidents are entitled to vote and to representation under the one person, one vote doctrine in the elected body that runs the government that exercises extraterritorial power.

With respect to their shared high school, the relationship between sending and receiving school districts in New Jersey clearly resembles the relationship between organized and unorganized counties in *Little Thunder*. The receiving district has complete authority over all issues relating to the high school education of children from the sending district, including curriculum, extracurricular activities, school facilities, and the hiring, transfer and firing of high school teachers and administrators. So, too, the receiving district has the power to impose a tuition charge on the sending district, which is paid out of sending district property tax revenue. In effect, the receiving district has the power to tax residents of the sending district.

Given the broad powers the receiving districts have with respect to the high school students and taxpayers of the sending districts, the sending districts are effectively part of the receiving district for high school purposes. Sending district residents are, for high school purposes, de facto residents of the receiving district with which they are paired. They should receive constitutionally fair representation on the receiving district's governing board.

The Third Circuit dismissed the significance of the substantial and direct powers the receiving districts have over sending district students and taxpayers by stressing that the receiving districts have power only with respect to high school education and not the complete K-12 education program. As a result, "the receiving district was not exercising the same governmental powers over the sending district as it does over its own residents." *See Branchburg, supra*, 312 F.3d at 621.

But this Court has never conditioned strict scrutiny of discriminatory rules limiting the right to vote on a finding that the elected officials exercise full governmental powers over those denied the equal right to vote. In *Board of Estimate v. Morris*, *supra*, for example, this Court upheld the application of the one person, one vote doctrine to the New York City Board of Estimate. Although the Board lacked general law-making power for New York City, it did enjoy "considerable authority" over a "significant range functions" and was, thus, subject to the one person, one vote doctrine. *See id.* at 694, 696.

Implicit in the Third Circuit's holding was a notion that the importance of a 9-12 program is so dwarfed by the importance of a K-12 program that fair representation is not

required. Petitioners submit that high school education, standing alone, is critically important and should invoke equal protection strict scrutiny. For example, in *Hadley, supra*, this Court held that the one person, one vote doctrine applied to a junior college district which presumably provided only a two-year, optional, degree program. This involved far less significant government authority over the junior college district than the control over a four-year, mandatory high school education wielded by New Jersey's receiving districts. Nonetheless the Court held that the trustees of the junior college district "perform important governmental functions within the districts" and that "these powers are general enough and have sufficient impact throughout the district to justify the conclusion" that one person, one vote applies. *Hadley*, 397 U.S. at 54. So, too, in this case, the receiving districts plainly perform important governmental functions with respect to the sending districts and their powers over education and to demand a tax-financed payment have sufficient impact on the receiving district to require the application of one person, one vote.

School districts vary in the number of educational grades they cover. Some teach only kindergarten through eighth grade; others teach just ninth through twelfth grade; still others offer a K-12 program. The right to vote in, and the application of the one person, one vote doctrine to, school district elections has never been contingent on a school district providing a full K-12 program. Although this Court has never considered the right to vote in a 9-12 high school district, it has sustained the application of the one person, one vote doctrine to a junior college district. *See Hadley, supra*. Other federal and state courts have held that the one person, one vote doctrine applies to school districts that offer simply a high school program and not a full K-12 education.

*See, e.g., Baker v. Regional High School Dist. No. 5*, 520 F.2d 799 (2d Cir. 1975); *Township of Marlboro v. Board of Education of Freehold Regional High School*, 992 F. Supp. 756 (D.N.J. 1998); *Barnes v. Board of Directors, Mt. Anthony Union High School District (No. 14)*, 418 F. Supp. 845 (D. Vt. 1975); *Township of Franklin v. Board of Education of North Hunterdon Regional High School*, 74 N.J. 345, 378 A.2d 218 (N.J. 1977).

This is not a situation in which receiving districts provide sending districts with limited services, like opportunities to participate in athletic teams or the high school band, or certain esoteric subjects, or specialized services. Instead, the receiving districts are providing the sending districts with a complete high school education. Surely the importance of a high school education in the development of local communities – and the impact of financing that education on local taxpayers – justifies the application of the one person, one vote doctrine to the boards of education that control high schools.

With respect to high school education, the powers of the receiving district over the sending district are identical to the powers of the receiving district within its own borders. The power to determine the curriculum, teaching staff, facilities, and costs of a high school program is a substantial one. When that power is controlled by an elective body, the laws that determine who may vote for that body and which discriminate among the parents and taxpayers directly and substantially affected by that elected body must be subject to strict judicial scrutiny and invalidated unless necessary to a compelling state interest. No such compelling interest has been advanced in this case.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari submitted by the Board of Education of the Township of Branchburg should be granted.

Respectfully submitted,

RICHARD BRIFFAULT
COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027
(212) 854-2638

JOHN J. GIBBONS
KEVIN MCNULTY
TIMOTHY S. SUSANIN*
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
One Riverfront Plaza
Newark, NJ 07102-5496
(973) 596-4500

* *Counsel of Record*

*Counsel for Amici Curiae*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 2002

BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG,

*Petitioner,*

*v.*

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE; WILLIAM L. LIBRERA,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

## REPLY BRIEF

LANCE J. KALIK
RONALD Z. AHRENS
RIKER, DANZIG, SCHERER, HYLAND & PERRETTI, LLP
HEADQUARTERS PLAZA
One Speedwell Avenue
P.O. Box 1981
Morristown, NJ 07962
(973) 538-0800

KENNETH W. STARR
*Counsel of Record*
KANNON K. SHANMUGAM
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

*Attorneys for Petitioner*

180372

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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## TABLE OF CONTENTS

*Page*

TABLE OF CITED AUTHORITIES ..... ii

A. The Decision Below Is In Tension With This Court's Decision In *Holt* ..... 1

B. The Question Presented Is A Recurring Question Of Exceptional Importance ..... 7

CONCLUSION ..... 10

## TABLE OF CITED AUTHORITIES

**Cases** *Page*

*Baker v. Carr*,
369 U.S. 186 (1962) ..... 6

*Ball v. James*,
451 U.S. 355 (1981) ..... 4, 5

*Brown v. Board of Education*,
347 U.S. 483 (1954) ..... 4

*Duncan v. Coffee County*,
69 F.3d 88 (1995) ..... 6

*Evans v. Cornman*,
398 U.S. 419 (1970) ..... 4-5

*Hadley v. Junior College District of Metropolitan Kansas*,
397 U.S. 50 (1970) ..... 3, 7

*Holt Civic Club v. City of Tuscaloosa*,
439 U.S. 60 (1978) ..... *passim*

*Kramer v. Union Free School District No. 15*,
395 U.S. 621 (1969) ..... 7

*Mixon v. State of Ohio*,
193 F.3d 389 (6th Cir. 1999) ..... 6

*Rice v. Cayetano*,
528 U.S. 495 (2000) ..... 9

*Zelman v. Simmons-Harris*,
122 S. Ct. 2460 (2002) ..... 4

*Cited Authorities*

*Page*

**Constitutional Provisions, Statutes, and Rules**

N.J. Stat. Ann. § 18A:38-13 ..... 2

N.J. Stat. Ann. § 18A:38-19 ..... 5

N.J. Stat. Ann. § 18A:38-21.1 ..... 2

**Miscellaneous**

Kimberly Brown, *Sending Districts Winning Larger Say*, Newark Star-Ledger, April 16, 2001 ..... 7

Matthew J. Dowling, *Sending Districts Seek Greater Presence*, Newark Star-Ledger, April 15, 2003 .. 7

Sue Epstein, *Bill Would Increase Input From Sending Districts*, Newark Star-Ledger, August 6, 2000 ..... 7

New Jersey State School Board Association, *Positions and Policies on Education*, February 2003, http://www.njsba.org/del_assembly/May03/sunset/9300.pdf ..... 8

*Sending Districts Receive A Boost: Representation Could Increase*, The Record (Hackensack, N.J.), November 17, 2002 ..... 7

This case presents an issue of fundamental importance to thousands of parents vitally concerned with the education and welfare of their children. After long decades of studied indifference to the interests of these parents, New Jersey embraced a manifestly minimalist approach in providing for token representation of these parents on the school boards that control their children's education. Under the Court's "one person, one vote" principle, however, this simply will not do. Respondents have offered no justification for this manifestly disproportional treatment, nor any reason that elections for these school boards should be treated any differently from other elections to which the "one person, one vote" principle has been applied. In light of the practical and legal significance of this case, the Court should grant certiorari.

## A. The Decision Below Is In Tension With This Court's Decision In *Holt*.

1. At the outset, respondents attempt to fabricate a vehicle problem by insinuating that Branchburg is currently capable of severing its send-receive relationship with Somerville. *See* Opp. of William L. Librera (hereafter "State Opp.") 4, 14; Opp. of Bd. of Educ. of the Borough of Somerville (hereafter "Somerville Opp.") 7, 11. These insinuations, however, constitute nothing more than litigation gamesmanship. The Third Circuit noted that "*both parties agree* that Branchburg cannot withdraw from the send-receive relationship in the foreseeable future," Pet. 15a (emphasis added), and relied heavily on that fact in its analysis, *see id.* at 19a-21a. Similarly, in the district court, Somerville freely admitted that "Branchburg has no cause, statutory or otherwise, to terminate the sending/receiving relationship." C.A. App. 318.

It is undisputed that Branchburg has attempted to avail itself of all three of the statutorily provided remedies for school districts seeking to terminate or alter their send-receive relationships. *See* N.J. Stat. Ann. §§ 18A:38-13, 18A:38-21.1. Specifically, Branchburg has unsuccessfully petitioned the Commissioner of Education to withdraw from the send-receive relationship, *see* Pet. 13a; unsuccessfully sought to form a regional school district with Somerville, *see id.* at 14a; and unsuccessfully sought to form a limited-purpose regional school district with Somerville, *see id.* at 15a. In light of Somerville's consistent opposition to Branchburg's efforts to sever or alter the send-receive relationship, *see id.* at 5, and the Commissioner of Education's apparent bright-line refusal to grant severance where students from the sending district constitute more than 25% of the receiving district's high-school population (much less more than 50%, as here), *see* Pet. 14, it is disingenuous for respondents to suggest that Branchburg could now successfully re-petition the Commissioner of Education to withdraw from the send-receive relationship. Indeed, Somerville acknowledged as much before the district court when it conceded that any additional attempts by Branchburg to sever the relationship are doomed to fail. *See* C.A. App. 318.

2. Like their attempt to recharacterize the facts of this case, respondents' efforts to reconcile the decision below with applicable case law are unavailing.

a. As demonstrated in our petition, the Third Circuit's decision is in tension with this Court's pathmarking decision in *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978). In the critical portion of *Holt*, the Court, speaking through then-Justice Rehnquist, recognized that the "one person, one vote" doctrine applies to a governmental body that exercises

extraterritorial authority *either* when the body "is exercising precisely the same governmental powers over residents of surrounding unincorporated territory as it does over those residing within its corporate limits," *id.* at 72 n.8, *or* when the body subjects non-residents to "important aspects of state powers," such as the "authority to levy and collect * * * taxes," *id.*

Like the Third Circuit, respondents disregard the Court's discussion of the latter category of cases — either by pretending it does not exist, *see* Somerville Opp. 10, or by claiming that it is mere "dicta," *see* State Opp. 9. In fact, the Court recognized both categories, and this case falls into both of them.

*First*, it is clear that the Somerville Board exercises "precisely the same governmental powers" over Branchburg's high school students as it does over its own. Like the Third Circuit, respondents contend that the Somerville Board exercises *different* power over its own residents than over Branchburg residents simply because Somerville only controls the education of Branchburg's *high school* students, not that of Branchburg's students in grades K to 8. *See* Somerville Opp. 15; State Opp. 9. As the *amicus* brief filed by Professor Briffault and Judge Gibbons persuasively demonstrates, however, it would be nonsensical to require a school board to exercise control over the *entire* cradle-to-grave education of non-residents before the "one person, one vote" principle could be invoked. *See* Br. of *Amici Curiae* Allamuchy Township Bd. of Educ. *et al.* (hereafter "School Boards Br.") 13-15. Indeed, in *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50 (1970), this Court applied the "one person, one vote" principle to the election of the board of trustees of a junior college district,

notwithstanding the fact that the board exercised authority only over a two-year, optional degree program, *see id.* at 53. Here, the Somerville Board has plenary authority to determine the curriculum, hire teachers, and manage facilities for Branchburg's high school students — precisely the same power that the Somerville Board exercises over its own high school students, and precisely the same power that the Branchburg Board would exercise if it only could educate its own students itself.

*Second*, it is equally clear that the Somerville Board subjects Branchburg residents to "important aspects of state powers": namely, the powers to educate and tax. As to education: remarkably, in its brief on behalf of the Commissioner of Education, the State of New Jersey seeks to minimize the importance of the power to educate, suggesting that it is "no more important or critical" than the general police powers at issue in *Holt*. State Opp. 9. However, as we detailed at length in our petition, *see* Pet. 10-12, this Court has long recognized that public education is "perhaps the most important function of state and local governments," *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954); *see also Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2480 (2002) (Thomas, J., concurring) (same). And the Court has routinely applied the "one person, one vote" principle in the educational context — a fact that "reflect[s] the Court's judgment as to the unique importance of education among the functions of modern government." *Ball v. James*, 451 U.S. 355, 372 n.1 (1981) (Powell, J., concurring). It therefore cannot seriously be argued that the authority of localities over education is not an "important aspect of state power;" in applying the "one person, one vote" doctrine to a municipal body that exercises extraterritorial authority, this Court has squarely recognized it as such. *See Evans v. Cornman*, 389

U.S. 419, 424 (1970); *cf. Holt*, 439 U.S. at 76 (Stevens, J., concurring) (listing the "operation of schools" as one of the important powers not exercised by the municipality in that case).

As to taxation: respondents seek to distinguish the discussion in *Holt* itself of the importance of taxation by characterizing the transfer of money from the Branchburg Board to the Somerville Board as mere tuition payments. *See* State Opp. 1; Somerville Opp. 6. In so doing, however, respondents elevate form over substance. As common sense would suggest, and as the Third Circuit found, Branchburg's "tuition" payments to Somerville come directly from Branchburg's tax base. *See* Pet. 12a. Because the Somerville Board has plenary power to establish the rates of "tuition," *see* N.J. Stat. Ann. § 18A:38-19, Somerville effectively has the ability to tax Branchburg residents. In the 2000-01 school year alone, the Somerville Board was projected to collect more than $4.8 million from Branchburg — which amounts to *several hundred dollars* from each of Branchburg's 14,566 residents. *See* Pet. 12a. Again, it cannot seriously be argued that the authority over taxation is not a "vital and traditional" one; again, this Court has recognized it as such. *Holt*, 439 U.S. at 72 n.8; *see also Ball*, 451 U.S. at 366 (same).

In sum, this is plainly a situation in which the residents of Branchburg are "just as interested in and connected with electoral decisions as * * * their neighbors." *Holt*, 439 U.S. at 72 n.8 (quoting *Evans*, 398 U.S. at 423) (internal quotation marks omitted). The Third Circuit's decision is in tension with *Holt*, and certiorari is warranted.

b. Moreover, the Third Circuit's decision is inconsistent with the Sixth Circuit's decision in *Mixon v. Ohio*, 193 F.3d

389 (6th Cir. 1999). Although respondents gamely attempt to explain away *Mixon*, *see* State Opp. 10; Somerville Opp. 12, *Mixon* states without qualification that legislation concerning the extraterritorial exercise of authority by a governmental entity is *always* subject to rational basis review, *see* 193 F.3d at 405. And in an earlier case, *Duncan v. Coffee County*, 69 F.3d 88 (1995), the Sixth Circuit similarly reasoned, again without qualification, that non-residents had no right to vote in a neighboring school district election "because they simply [did] not live" in the district, *id.* at 94. Unlike the Third Circuit, the Sixth Circuit therefore appears to recognize *no* situation in which the "one person, one vote" principle applies to a governmental body that exercises extraterritorial authority. Like the decision below, the Sixth Circuit's decision in *Mixon* is in tension with this Court's decision in *Holt*. The Sixth Circuit's jurisprudence merely points up the uncertainty generated by *Holt* as to the application of the "one person, one vote" doctrine in the extraterritorial context — uncertainty that this Court should resolve by granting certiorari here.

3. Finally, the State of New Jersey makes the desperate and extraordinary suggestion that, to the extent that Branchburg parents do not want to leave control of their children's education in the hands of the Somerville Board, they should simply enroll their children in private schools or educate them at home. *See* State Opp. 4. Similarly, we suppose, the residents of one of the underrepresented districts in *Baker v. Carr*, 369 U.S. 186 (1962), could simply have moved into one of the overrepresented districts. At the outset, even if particular parents were to withdraw their children from Somerville High School, the constitutional problem would not go away, since those parents would still be required effectively to pay taxes to the unaccountable Somerville Board. More fundamentally, however, this Court has routinely applied the "one person, one vote"

doctrine in the context of elections relating to public education, notwithstanding the fact that States could choose not to have elected school boards (or not to provide public education in the first place), much less the fact that students could choose not to attend those schools. *See Hadley*, 397 U.S. at 50; *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969). New Jersey's proposed "solution" is nothing less than a tacit recognition of the weakness of its case. This Court should grant certiorari and apply strict scrutiny to the New Jersey scheme.

**B. The Question Presented Is A Recurring Question Of Exceptional Importance.**

1. Respondents repeatedly attempt to play down the significance of this case to the residents of New Jersey. *See, e.g.*, State Opp. 15; Somerville Opp. 18. However, as we noted in our petition, *see* Pet. 13, over 215 New Jersey school districts — more than a third of the districts in the State — are currently in send-receive relationships with other districts. As numerous press reports have detailed, many of those districts have been engaged in similar efforts to extricate themselves from send-receive relationships or to obtain greater representation on the boards of receiving districts. *See, e.g.*, Mathew J. Dowling, *Sending Districts Seek Great Presence*, Newark Star-Ledger, Apr. 15, 2003, at A4; *Sending Districts Receive A Boost: Representation Could Increase*, The Record (Hackensack, N.J.), Nov. 17, 2002, at A5; Kimberly Brown, *Sending Districts Winning Larger Say*, Newark Star-Ledger, Apr. 16, 2001, at 9; Sue Epstein; *Bill Would Increase Input From Sending Districts*, Newark Star-Ledger, Aug. 6, 2000, at 37. Indeed, some seventeen sending districts have filed an *amicus* brief in this Court, supporting the petition for certiorari. *See* School Boards Br. 2-3. And the New Jersey School Board Association (NJSBA), an organization composed of delegates

from each New Jersey school board, recently passed a resolution calling for the proportional representation of sending districts on the boards of receiving districts. *See* NJSBA, Positions and Policies on Education, at 4 (Feb. 2003), *available at* http://www.njsba.org/del_assembly/May03/sunset/9300.pdf. Despite numerous proposals, however, sending districts have been unable to obtain relief from the New Jersey Legislature. This Court's intervention is therefore necessary to remedy the endemic underrepresentation on New Jersey school boards.

Moreover, respondents' efforts to suggest that this case does not present a question of great significance to the residents of New Jersey are utterly belied by their own assertions earlier in this litigation. In seeking to have the Third Circuit intervene at an earlier stage of the case, the State of New Jersey acknowledged that "there are * * * other sending-receiving relationships in New Jersey, in which the students of the 'sending' district outnumber those of the 'receiving' district," and concluded that "the holding below will transcend the instant parties and extend to other school districts across the State." C.A. State § 1292(b) Pet. 5. The Somerville Board went even further in emphasizing the importance of this case:

> The matters presented to this Court are momentous. The constitutionality of the statute at issue has importance not only to the parties herein, but also the school boards across the state. In fact, in light of this Court's findings that the voting franchise exists across political lines, the Somerville Board respectfully suggests that this Court's decision has national impact.

D.Ct. Somerville § 1292(b) Brf. 11. Respondents can hardly change their tune merely because they are now defending, rather than attacking, the judgment below.

2. Even if this case were only to affect the residents of New Jersey, this Court's review would be warranted. Where fundamental rights such as the right to vote are involved, this Court has routinely granted certiorari, even when the regulatory scheme being reviewed is unique and therefore no circuit split could exist. *See, e.g.*, *Rice v. Cayetano*, 528 U.S. 495 (2000) (striking down, under Fifteenth Amendment, Hawaii law allowing only "Hawaiians" to vote for trustees of Office of Hawaiian Affairs).

As the Somerville Board itself represented to the Third Circuit, however, this case will have implications not only for the New Jersey send-receive scheme, but also for a wide variety of laws in other States providing for some form of extraterritorial jurisdiction. As the *amicus* brief details, there are literally thousands of "interlocal contracts, joint service agreements, transfers of functions, and other special arrangements for the provision of important local government services" that are potentially subject to this Court's "one person, one vote" jurisprudence. School Boards Br. 4-5. This Court should grant certiorari to clarify the circumstances, if any, under which a municipal body that exercises extraterritorial authority pursuant to these arrangements violates the "one person, one vote" principle. This Court's guidance is needed in this area, and it is needed in this case.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

LANCE J. KALIK
RONALD Z. AHRENS
RIKER, DANZIG, SCHERER,
HYLAND & PERRETTI, LLP
HEADQUARTERS PLAZA
One Speedwell Avenue
P.O. Box 1981
Morristown, NJ 07962
(973) 538-0800

KENNETH W. STARR
*Counsel of Record*
KANNON K. SHANMUGAM
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

*Attorneys for Petitioner*